IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: APPLE & AT&TM ANTITRUST LITIGATION.	C-07-05152-JW SEPTEMBER 12, 2008 PAGES 1- 97

THE PROCEEDINGS WERE HELD BEFORE

THE HONORABLE UNITED STATES DISTRICT

JUDGE JAMES WARE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ
BY: MARK C. RIFKIN
270 MADISON AVENUE
NEW YORK, NEW YORK 10016

RANDALL S. NEWMAN, P.C.
BY: RANDALL S. NEWMAN
40 WALL STREET
61ST FLOOR
NEW YORK, NEW YORK 10005

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

A P P E A R A N C E S: (CONT'D)

FOR THE DEFENDANTS:

CROWELL & MORING
BY: DANIEL A. SASSE
3 PARK PLAZA
20TH FLOOR
IRVINE, CALIFORNIA 92614

MAYER & BROWN
BY: DONALD M. FALK
TWO PALO ALTO SQUARE
SUITE 300
PALO ALTO, CALIFORNIA 94306

LATHAM & WATKINS
BY: DANIEL M. WALL
SADIK H. HUSENY
ALFRED C. PFEIFFER, JR.
505 MONTGOMERY STREET
SUITE 1900
SAN FRANCISCO, CALIFORNIA 94111

SAN JOSE, CALIFORNIA SEPTEMBER 12, 2008

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: BEFORE WE BEGIN, I WANTED TO MAKE A BRIEF INTRODUCTION. ONE OF THE JOYS OF THIS POSITION AS A DISTRICT JUDGE IS THE ABILITY TO TEACH AND A LOT OF MY COLLEAGUES SPEND TIME IN THE CLASSROOM. IT'S OUR WAY OF GIVING BACK.

AND I INVITED STUDENTS FROM MY FEDERAL COURTS CLASS TO ATTEND VARIOUS SESSIONS OF COURT, AND SOME OF THEM HAVE CHOSEN TO BE HERE FOR PURPOSES OF THESE PROCEEDINGS.

AND THE REASON I'M POINTING THAT OUT, AND THERE MAY BE QUESTIONS THAT I ASK OF YOU WITH STUDENTS PRESENT THAT I WOULDN'T ASK OTHERWISE BECAUSE WE MAKE CERTAIN ASSUMPTIONS ABOUT THE THINGS THAT I THINK SOMETIMES CAN HELP THEM MAKE IT EXPLICIT TO HELP THE ARGUMENT.

AND I DIDN'T WANT MY QUESTIONS TO PROMPT YOU TO THINK, "MY GOODNESS, HE'S ASKING A FUNDAMENTAL QUESTION. I WONDER IF HE HAS READ MY PAPERS." BUT I HAVE READ YOUR PAPERS AND SO THE REASON FOR MY QUESTIONS WOULD BE TO EDUCATE WITH RESPECT TO THIS ARGUMENT.

VERY WELL. CALL THE CASE.

THE CLERK: CALLING CASE NUMBER 07-05152, IN RE: APPLE AND AT & TM ANTITRUST LITIGATION.

ON FOR DEFENDANT'S AT & TM'S MOTION TO COMPEL ARBITRATION AND DEFENDANT'S MOTION TO STAY DISCOVERY. TEN MINUTES EACH SIDE.

DEFENDANT APPLE'S MOTION TO DISMISS. TWENTY MINUTES EACH SIDE.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

MR. WALL: GOOD MORNING. DANIEL WALL AND AL PFEIFFER FROM LATHAM & WATKINS REPRESENTING APPLE.

MR. FALK: GOOD MORNING. DONALD FALK FROM MAYER BROWN REPRESENTING AT & T MOBILITY.

MR. SASSE: AND DAN SASSE ALSO REPRESENTING AT & T MOBILITY.

MR. RIFKIN: GOOD MORNING. MARK RIFKIN FROM WOLF, HALDENSTEIN IN NEW YORK ON BEHALF OF PLAINTIFFS.

MR. NEWMAN: GOOD MORNING, YOUR HONOR. RANDALL NEWMAN FROM NEW YORK ON BEHALF OF PLAINTIFFS AS WELL.

THE COURT: VERY WELL. WE SORT OF DIVIDED UP THE TIME WITH RESPECT TO THIS MOTION.

AND I ACTUALLY, BY THE CLERK'S CALLING OF THE CASE, SUGGESTED THAT WE HEAR THIS MOTION HAVING TO GO DO WITH AT & T'S MOTION TO DISMISS AND TO COMPEL ARBITRATION FIRST.

WHO IS GOING TO HANDLE THAT ARGUMENT?

MR. FALK: I AM, YOUR HONOR.

THE COURT: MR. FALK.

THAT MIKE MIGHT BE BETTER.

MR. FALK: IT SEEMS CLOSER TO THE STUDENTS AND IT'S DEFINITELY LIVE.

THANK YOU, YOUR HONOR.

WE HAVE SEVERAL PLAINTIFFS HERE AND A FEW ISSUES TO COVER. I'D LIKE TO -- I WILL BACK UP A LITTLE BIT FOR THE BENEFIT OF THE STUDENTS.

WE BROUGHT THIS MOTION TO COMPEL ARBITRATION ACCORDING TO THE AGREEMENTS INTO WHICH THE PLAINTIFFS WHO ARE CUSTOMERS OF AT & T MOBILITY AND THE AGREEMENTS THEY ENTERED INTO WHEN THEY BEGAN SERVICE WITH AT & T MOBILITY.

FOR TWO OF THOSE PLAINTIFFS, KLIEGERMAN AND LEE, WHO ARE NEW YORK RESIDENTS, THE ARBITRATION AGREEMENT IS CLEARLY ENFORCEABLE. PLAINTIFFS HAVE NOT EVEN CONTENDED THAT IT IS SUBSTANTIVELY UNCONSCIONABLE AND THEIR CONTENTIONS THAT IT IS PROCEDURALLY UNCONSCIONABLE ARE

CORRECTED BY NEW YORK DECISIONS WHICH HAVE FOUND BOTH THE FACT THAT A PRODUCT IS UNIQUE, CAN BE CHARACTERIZED AS UNIQUE OR OTHERWISE DESIRABLE DOES NOT NECESSARILY AND, IN FACT, DOES NOT IN A GENERAL PRINCIPAL MAKE ALL CONTRAST WITH RESPECT TO THAT PRODUCT PROCEDURALLY UNCONSCIONABLE AND THAT A ROUTINE STOCKING FEE APPLIED TO ELECTRONICS AND OTHER PRODUCTS FROM TIME TO TIME IS ALSO NOT SOMETHING THAT RENDERS A CONTRACT UNCONSCIONABLE.

MOREOVER, NEW YORK REQUIRES A FINDING OF BOTH PROCEDURAL AND UNCONSCIONABILITY AND BECAUSE THE ONLY GROUND OF SUBSTANTIVE AND CONSCIONABILITY ASSERTED HERE IS THE FACT THAT THE AGREEMENTS, THE PLAINTIFFS HAVE AGREED TO ARBITRATE THEIR CLAIMS INDIVIDUALLY AND NOT IN A CLASS ACTION.

THAT GROUND IS ACCEPTED BY THE NEW YORK COURTS AS SOMETHING AND IT'S FULLY ENFORCEABLE.

SO I'D LIKE TO MOVE -- UNLESS THE COURT HAS QUESTIONS WITH RESPECT TO THE NEW YORK PLAINTIFFS, I'D LIKE TO MOVE TO THE CALIFORNIA AND WASHINGTON PLAINTIFFS.

THE COURT: LET ME ASK JUST WITH RESPECT TO THE NEW YORK ARGUMENT, YOUR ARGUMENT IS THAT UNDER NEW YORK LAW YOU NEED BOTH PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY?

MR. FALK: YES, YOUR HONOR.

THE COURT: AND THIS IS A MOTION WHICH ADDRESSES THE ALLEGATIONS OF THE COMPLAINT AND IS IT SUFFICIENT IF THE PLAINTIFFS ALLEGE PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY AT THIS POINT OR MUST I FIGURE OUT WHETHER THEY CAN PROVE IT?

MR. RIFKIN: WELL, YOUR HONOR, IN A MOTION TO COMPEL ARBITRATION BY CONTRAST WITH THE MOTION TO DISMISS THAT YOU'LL BE HEARING SHORTLY IT WAS NOT ENTIRELY DETERMINED ON THE PLEADINGS.

THE COURT HAS TO EXAMINE THE CONTRACT AND EXAMINE WHATEVER FACTS ARE PRESENTED IN THE CASE BECAUSE THIS IS A MOTION TO DIVERT THIS CASE FROM THE COURTROOM TO ANOTHER DISPUTE RESOLUTION PROCEEDING.

AND THIS IS UNLIKE THE MOTION TO DISMISS, WHICH IS THE FIRST STAGE IN THE LITIGATION AND THEN THERE WILL BE FACTUAL ELEMENTS TO RESOLVE THE ISSUES, THE ISSUES WITH RESPECT TO THE ENFORCEABILITY OF THE ARBITRATION CLAUSE HAS TO BE DETERMINED HERE AND NOW.

THE COURT: RIGHT. AND SO YOUR SUGGESTION IS THAT I SHOULD PAUSE AND TAKE EVIDENCE OF THE CIRCUMSTANCES AND ASSUME THAT I HAVE THEM ALL SET OUT IN FRONT OF ME AND ALL OF THAT AND

FIGURE OUT WHETHER THAT APPLIES JUST TO THE NEW YORK PARTIES.

MR. FALK: STARTING WITH THE NEW YORK PARTIES. AND IT IS, UNDER ALL OF THE RELEVANT LAWS, IT IS THE PLAINTIFF'S BURDEN TO SHOW THAT A CONTRACT IS UNCONSCIONABLE AND THUS UNENFORCEABLE.

THE COURT: UNDER YOUR ARGUMENT, WOULD I CONSIDER THIS AN ADHESION CONTRACT?

MR. FALK: UNDER CALIFORNIA LAW?

THE COURT: NO, UNDER NEW YORK LAW.

MR. FALK: IT'S NOT UNCONSCIONABLE.

THE COURT: NO, THAT'S NOT MY QUESTION. IS IT A CONTRACT OF ADHESION?

MR. FALK: IT IS A FORM CONTRACT SO TO THE EXTENT -- I DO NOT BELIEVE THAT NEW YORK HAS QUITE THE BLANKET LABELLING OF ALL FORM CONTRACTS OF ADHESION THAT CALIFORNIA HAS. IT IS CERTAINLY A FORM CONTRACT. IT IS NOT AN INDIVIDUALLY NEGOTIATED CONTRACT.

THE COURT: SO YOU WOULD NOT WANT ME TO USE THE TERM CONTRACT OF ADHESION BUT IT IS TAKE IT OR LEAVE IT.

MR. FALK: IT IS TAKE IT OR LEAVE IT, YOUR HONOR. AND UNDER THE NEW YORK ANALYSIS, WHAT I'M SUGGESTING, YOUR HONOR, IS THAT FOR THE ISSUE

OF PROCEDURAL UNCONSCIONABILITY, THE MERE FACT OF A FORM DOES NOT NECESSARILY GET YOU EVEN SLIGHTLY OVER THE LINE.

WE CONCEDE IN OUR PAPERS THAT IN CALIFORNIA IT APPEARS, AT LEAST THERE'S ONE LINE OF CASES, THERE ARE TWO CONFLICTING LINE OF CASES AND THE NINTH CIRCUIT HAS ADOPTED THE LINE THAT HAS SAID THAT ANY FORM CONTRACT IS A CONTRACT OF ADHESION AND THUS AT LEAST MINIMALLY PROCEDURALLY UNCONSCIONABLE.

THE COURT: AND, WELL, THESE ARE CIRCUMSTANCES WHERE THE CONSUMER IS NOT PERMITTED TO CORRECT ANOTHER PROVIDER.

MR. FALK: WELL, YOUR HONOR, THE -- THE -- IT DEPENDS. WHEN YOU LOOK AT CONSUMERS CHOICE, IT DEPENDS WHAT KIND YOU'RE LOOKING AT. THERE ARE DOZENS AND DOZENS OF MULTI CELL PHONES THAT PLAY MUSIC OUT THERE.

THE CONSUMER WHO WANTED AN IPHONE HAD TO BUY FROM APPLE AND HAD TO GET SERVICE FROM AT & T.

THE COURT: BUT THAT PURCHASE OF SERVICE TAKES PLACE AFTER YOU BOUGHT THE PHONE.

MR. FALK: IT'S MEANINGFULLY SIMULTANEOUS, YOUR HONOR.

THE COURT: AND SO DOES THAT MAKE A

DIFFERENCE IF IT'S MEANINGFULLY SIMULTANEOUS?

MR. FALK: WELL, WE'RE DISCUSSING AN ISSUE THAT IS OBVIOUSLY QUITE, IN OUR VIEW, IS, IN FACT, QUITE IMPORTANT UNDER -- I'LL SLOW IT DOWN A LITTLE BIT.

UNDER CALIFORNIA UNCONSCIONABILITY LAW THERE IS A LINE OF CASES THAT SAYS THAT IF THERE'S A MEANINGFUL CHOICE, AND WE BELIEVE THAT THERE IS, A MEANINGFUL CHOICE OF A PRODUCT OR SERVICE, THEN THE CONTRACT IS NOT PROCEDURALLY UNCONSCIONABLE AT ALL.

THE COURT: LET ME MOVE BEYOND THIS BECAUSE WE'RE GOING TO SPEND A LOT OF TIME HERE AND I DON'T THINK IT'S NECESSARY.

MR. FALK: YES.

THE COURT: BECAUSE I WAS ASSUMING FROM WHAT I WAS READING THAT THE PLAINTIFFS ASKED THE COURT TO REGARD THERE TO BE NO MEANINGFUL DISTINCTION BETWEEN CALIFORNIA, WASHINGTON, NEW YORK LAW WITH RESPECT TO THIS.

AND IF YOU SEE A DISTINCTION, MAYBE THAT'S WHAT YOU OUGHT TO HIGHLIGHT FOR ME, WHAT IS IT THAT IS DIFFERENT ABOUT THE LAW IN NEW YORK AS YOU START OFF THAT IS SO DIFFERENT THAT I SHOULD BE LOOKING AT THE NEW YORK PEOPLE DIFFERENTLY?

MR. FALK: WELL, WHAT IS MOST DIFFERENT IS THE SUBSTANTIVE UNCONSCIONABILITY PART OF THE ANALYSIS. PROCEDURAL UNCONSCIONABILITY IS SLIGHTLY DIFFERENT BUT WHAT IS DISPOSITIVELY DIFFERENT IS THE UNCONSCIONABILITY ANALYSIS.

NEW YORK COURTS HAVE REPEATEDLY UPHELD ARBITRATION AGREEMENTS THAT HAVE REQUIRED INDIVIDUAL ARBITRATION RATHER THAN CLASS ARBITRATION AND THAT PRETTY MUCH ENDS THE ANALYSIS BECAUSE THE NEW YORK COURT OF APPEALS REQUIRES A FINDING OF BOTH PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY.

PLAINTIFFS HAVE NOT EVEN CONTENDED THAT THESE CONTRACTS ARE SUBSTANTIVELY UNCONSCIONABLE UNDER NEW YORK LAW. AND THAT IS THE DISPOSITIVE DIFFERENCE, BUT WITH THE COURT'S INDULGENCE I'D LIKE TO TURN TO THE CALIFORNIA AND WASHINGTON.

THE COURT: GO AHEAD.

MR. FALK: WHICH THE PLAINTIFFS HAVE NOT CONTENDED THAT THIS CONTRACT IS PROCEDURALLY UNCONSCIONABLE UNDER WASHINGTON LAW.

UNDER CALIFORNIA LAW THE ANALYSIS, I THINK WE COVERED THAT AT LEAST TO MY SATISFACTION. IF THE COURT HAS FURTHER QUESTIONS, I'M HAPPY TO TOUCH ON THOSE. BUT I'D LIKE TO FOCUS, IF I MAY,

ON THE SUBSTANTIVE, THE WAY THAT THE AT & T AGREEMENT HAS PROVIDED BOTH AN ACCESS AND INCENTIVE FOR CONSUMERS TO RESOLVE THEIR CLAIMS INDIVIDUALLY IN A WAY THAT BRINGS IT OUTSIDE OF THE HOLDINGS OF SHROYER AND THE CALIFORNIA COURTS AND THE SIMILAR HOLDING OF THE WASHINGTON COURTS.

IN BOTH, IN SHROYER, WHICH IS THE NINTH CIRCUIT DECISION ADDRESSING CALIFORNIA LAW, THE FOCUS WAS ON THE OPPORTUNITY FOR GAIN OF THE INDIVIDUAL CONSUMER.

THE CONCERN WAS THAT A CONSUMER WITH A SMALL CLAIM, EVEN IF HE DIDN'T HAVE TO PAY ARBITRATION FEES AND HAD A POSSIBILITY OF GETTING ATTORNEY'S FEES IF HE PREVAILED, WOULD NOT HAVE THE INCENTIVE TO BRING A SUIT.

LIKEWISE THE CONCERN IN WASHINGTON IS WHETHER CONSUMERS WILL GO TO THE TIME AND TROUBLE, I BELIEVE THE PHRASE WAS, TO VINDICATE THEIR CLAIMS.

UNDER THIS PROVISION, THE CONSUMERS HAVE A FULL INCENTIVE TO BRING THEIR CLAIMS TO AT & T AND TO ARBITRATE THEM IF AT & T DOES NOT SATISFY THEM BEFORE IT GETS TO THAT STAGE. AND, IN FACT, THE PREMIUMS THAT HAVE BEEN BUILT INTO THIS ARBITRATION CLAUSE ENSURE THAT.

UNDER AT & T'S CURRENT ARBITRATION CLAUSE, WHICH IS THE ONE AT ISSUE FOR EVERYONE HERE, THEY'RE ALL CURRENT AND VERY RECENT CUSTOMERS, IF A CONSUMER HAS NOT GOTTEN SATISFACTION THROUGH AT & T'S INFORMAL DISPUTE RESOLUTION PROCESS AND BRINGS A NOTICE OF ARBITRATION, AND AT & T DOES NOT SETTLE THE CASE OR AT & T'S LAST SETTLEMENT OFFER IS LESS THAN WHAT THE CONSUMER GETS AT ARBITRATION, THE CONSUMER AUTOMATICALLY, NO MATTER HOW SMALL THE CLAIM, GETS IN CALIFORNIA $7,500, IN ANY STATE AT LEAST 5,000 DEPENDING UPON THE SMALL CLAIMS COURT CUTOFF AND DOUBLE ATTORNEY FEES.

THAT IS ENOUGH TO BOTH PROVIDE A POWERFUL INCENTIVE FOR AT & T TO PROVIDE ACCEPTANCE IN THE WEAKEST OF CLAIMS AND TO PROMPT CONSUMERS TO BRING THEIR CLAIMS.

INDEED --

THE COURT: BUT WHY IN SCOTT, WHICH WAS A WASHINGTON CASE, THE WAIVER OF THE CLASS ACTION WAS ALSO PRESENT AND A BASIS OF THE COURT TO FIND SUBSTANTIVE UNCONSCIONABILITY?

WHY SHOULD I NOT FIND THE SAME THING HERE?

MR. FALK: WELL, YOUR HONOR, IN BOTH

SCOTT AND THE CALIFORNIA CASES, AND SHROYER, THE NINTH CIRCUIT CASES AS A SHORTHAND BUT IN THE CALIFORNIA CASES, IN BOTH STATES, HOWEVER, THE COURTS HAVE SAID THAT THERE IS NOT AN ACROSS THE BOARD BAN ON CLASS WAIVERS. WHAT THERE IS, IS SUFFICIENT INCENTIVE FOR PEOPLE TO BRING CLAIMS AND WHETHER OR NOT THEY'RE LIKELY TO GET MEANINGFUL RELIEF.

AND THE PLAINTIFFS DO NOT DISPUTE THAT WERE THEY TO ARBITRATE ACCORDING TO THEIR AGREEMENTS, THEIR CHANCES OF GETTING FULL RELIEF ARE AT LEAST AS GOOD OR PROBABLY SUBSTANTIALLY BETTER THAN THEY WOULD BE UNDER A CLASS ENVIRONMENT.

THE COURT: AND YOUR ARGUMENT IS THAT THE INCENTIVES THAT WERE BUILT IN WERE PRESENT WEREN'T PRESENT IN SCOTT?

MR. FALK: THEY WEREN'T.

THE COURT: WERE THEY IN STIENER?

MR. FALK: YES, THEY WERE.

THE COURT: WHAT HAPPENED THERE?

MR. FALK: IN THAT CASE JUDGE ARMSTRONG WENT -- JUDGE ARMSTRONG IMPOSED A NEW REQUIREMENT WHICH IS THAT THE PROPONENT OF AN ARBITRATION CLAUSE, SHE SHIFTED THE BURDENS.

THE BURDEN'S ON THE OPPONENT OF AN ARBITRATION CLAUSE. JUDGE ARMSTRONG SHIFTED THE BURDEN TO THE PROPONENT TO SHOW THAT THE OVERALL RECOVERY OF A POTENTIAL CLASS ACTION WOULD BE EQUAL OR EXCEEDED BY THE RECOVERY BY ALL OF THE HYPOTHETICAL PEOPLE WHO MIGHT BRING CLAIMS WITHIN THE ARBITRATION PROCEDURE.

THE COURT: WAS THAT AN ERROR ON HER PART?

MR. FALK: YES, YOUR HONOR.

THE COURT: IS THAT ON APPEAL?

MR. FALK: YES, IT IS.

THE COURT: SO I SHOULDN'T CONSIDER THAT AS SETTLED LAW?

MR. FALK: IT CERTAINLY IS NOT CONSIDERED AS SETTLED LAW. IT'S AN INNOVATION GETS FAR BEYOND WHAT THE COURTS HAVE ACTUALLY HELD AND FOCUSSED ON.

AND, IN FACT, BECAUSE OF THE DIFFICULTY AND, IN FACT, IT'S PURE SPECULATION TRYING TO FIGURE OUT WHETHER A PUNITIVE CLASS WILL BE CERTIFIED AND WHETHER THEY WIN AND WHAT THE SETTLEMENT WOULD BE, HOW MUCH THE RECOVERY WOULD BE, WHO WOULD ACTUALLY SIGN UP FOR THE DISCOVERY AND ALL OF WHICH WE COVERED IN SOME DETAIL IN THEIR PAPERS.

BUT IT'S A FAIRLY SMALL FRACTION OF A HIGHLY SPECULATIVE ANALYSIS AND EQUALLY SPECULATIVE ON THE OTHER SIDE. WHO WOULD BRING ARBITRATION CLAIMS AND WHO WOULD BRING INFORMAL CLAIMS AND WHAT THEY WOULD GET AND HOW YOU ADD THAT ALL UP, THAT'S AN ANALYSIS THAT EFFECTIVELY PRECLUDES ANY KIND OF REQUIREMENT OF INDIVIDUAL ARBITRATION.

AND IT ALSO IMPOSES A HURDLE TO THE ENFORCEMENT OF THE ARBITRATION AGREEMENT THAT IS COMPLETELY INCONSISTENT WITH THE FEDERAL ARBITRATION ACT WHICH BASICALLY SAYS THAT YOU'RE SUPPOSED TO ENFORCE THESE AND GET THESE INTO --

THE COURT: AND LET ME ASK THIS, AND I'LL HEAR FROM YOUR OPPONENT.

IF YOU'RE IN A CIRCUMSTANCE SUCH AS THIS, WHERE THE ISSUE TO BE ARBITRATED IS INEXTRICABLY TIED TO AN ISSUE WHICH IS NOT SUBJECT TO ARBITRATION, WHAT DOES THE COURT DO?

DOES THE COURT SEND OUT THE ISSUE FOR ARBITRATION AND SAY LET'S JUST ARBITRATE EVEN THOUGH WHATEVER IS DECIDED IN THE ARBITRATION CAN'T BE DEFINITIVE BECAUSE THERE ARE ISSUES THAT THE ARBITRATOR WILL HAVE TO CONSIDER THAT THE ARBITRATOR CAN'T CONSIDER BECAUSE THEY'RE NOT ARBITRATABLE?

IT SEEMS TO ME THAT THE QUESTION OF THE TIE BETWEEN THE CLAIMS BETWEEN AT & T AND APPLE, THEY PUT THEMSELVES INTO A CONTRACT WHICH BINDS THEM, BUT ONE HAS AN ARBITRATION CLAUSE AND THE OTHER EXPRESSLY DOES NOT. WHAT DO I DO THERE?

MR. FALK: WELL, THE SUPREME COURT HAS ANSWERED THAT QUESTION IN THE DEAN WHITTER VERSUS BYRD CASE WHERE THE COURT WITHOUT DESCENT REVERSED THE NINTH CIRCUIT DECISION THAT SAID IN THAT CASE THAT THE SUPREME COURT SAID THAT THE POLICIES OF THE FEDERAL ARBITRATION ACT PREVAIL HERE AND THE PARTS THAT GET ARBITRATED, GET ARBITRATED AND THE PARTS THAT GET LITIGATED, GET LITIGATED.

THE COURT: BUT THAT PRESUMES THAT THEY CAN BE PARSED OUT AND SEPARATELY CONSIDERED AND SEPARATELY DECIDED.

MR. FALK: WELL, THEY CAN. WE HAVE TWO SEPARATE DEFENDANTS.

THE COURT: ALL RIGHT.

MR. FALK: APPLE IS NOT PART OF THE AT & T ARBITRATION AGREEMENT.

THE COURT: IT'S NOT PART OF THE AT & T ARBITRATION AGREEMENT, BUT IT'S INEXTRICABLY TIED TO THE SERVICE.

MR. FALK: BUT IT'S NOT -- THEIR

LIABILITY IS NOT OUR LIABILITY. OUR LIABILITY IS NOT THEIR LIABILITY.

WHEN IT COMES DOWN TO A DISPUTE, IT HAS TO BE, YOU KNOW, SOMEONE -- IF PLAINTIFFS PREVAIL, SOMEONE HAS TO PAY AND WHAT COMES OUT OF OUR POCKET DOESN'T COME OUT OF THEIR POCKET AT LEAST FOR PURPOSES OF SETTING ASIDE ANYTHING NOT BEFORE THE COURT.

I MEAN, WHAT WE HAVE IS TWO SEPARATE DEFENDANTS AND THE CONDUCT --

THE COURT: I HESITATE TO RAISE THE QUESTION BECAUSE I HAVEN'T THOUGHT IT THROUGH, BUT IT DOES SEEM TO ME THAT IF YOU'RE CORRECT THAT I MUST SEND FOR ARBITRATION, THE NEXT BIG JOB IS HOW TO ARBITRATE? WHAT PART I'M ARBITRATING WITHOUT GIVING TO THE ARBITRATOR MATTERS THAT THE PLAINTIFFS ARE ENTITLED TO HAVE TRIED IN A COURT GIVEN THE NATURE OF THE INTERTWINING OF THE RELATIONSHIPS AND THAT PART I HAVEN'T THOUGHT ABOUT, BUT I WANTED TO RAISE IT AND IT SOUNDS LIKE YOU HAVEN'T THOUGHT A LOT ABOUT IT BUT YOU'RE READY TO.

MR. FALK: WELL, YOUR HONOR, WHAT IS AN ADJUDICATION AGAINST AT & T OR IN FAVOR OF AT & T DOES NOT NECESSARILY CARRY OVER TO APPLE.

THE COURT: WELL, THAT'S THE QUESTION -- YOU'RE MAKING THAT AS A STATEMENT. I'M NOT SURE I'VE COME THERE YET.

AND SO IF I WERE TO FIND THAT, THEN THAT WOULD PUT US BOTH IN A BETTER POSITION AND WHATEVER IS THE QUESTION WITH RESPECT TO SERVICE AND THE ABILITY TO SWITCH SERVICES AND TIE IT INTO SERVICE IS SEPARATELY ARBITRATABLE AND WILL NOT REQUIRE THAT THE PLAINTIFFS LITIGATE IN THE ARBITRATION MATTERS THAT THEY ARE ENTITLED TO TRY TO A COURT. THAT PART I HAVEN'T QUITE GOTTEN TO.

MR. FALK: THEY'RE ENTITLED TO TRY THEM AGAINST APPLE. THEY'RE NOT ENTITLED TO TRY THEM IN A COURT AGAINST AT & T.

THE COURT: THAT'S YOUR ARGUMENT.

MR. FALK: THE AGREEMENT DOESN'T REACH THEIR CLAIMS AGAINST APPLE. IT REACHES THEIR CLAIMS AGAINST US AND AS I SAID THE COURT NOT ONLY -- THE SUPREME COURT NOT ONLY TOLERATES BUT MANDATED PIECEMEAL CIRCUMSTANCES. THANK YOU.

THE COURT: VERY WELL. COUNSEL. MR. RIFKIN.

MR. RIFKIN: GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT, MY NAME IS MARK RIFKIN AND I REPRESENT THE PLAINTIFFS AND THE CLASS IN THIS

CASE.

I WOULD LIKE TO BEGIN BY PICKING UP ON THE LAST POINT YOU RAISED WITH MY OPPONENT AND THAT IS THE QUESTION THAT WE ALWAYS HAD ABOUT THIS ARBITRATION AGREEMENT.

AS YOUR HONOR KNOWS THE HEART OF THIS CASE IS A CONSPIRACY BETWEEN APPLE AND AT & T TO MONOPOLIZE CERTAIN AFTER-MARKETS FOR IPHONE SERVICE.

THIS IS THE TWO AFTER-MARKETS THAT WE HAVE DEFINED. ONE HAS TO DO WITH THE REGULAR CELLULAR VOICE AND DATA SERVICE AND THE OTHER IS THE AFTER-MARKET.

WE CANNOT CONCEIVE OF A WAY THAT APPLE COULD BE FOUND TO PARTICIPATE IN A CONSPIRACY WITH AT & T BUT AT & T FOUND NOT TO HAVE PARTICIPATED IN THAT SAME CONSPIRACY.

AND SO IT STRUCK US THAT AN ARBITRATION AGREEMENT WOULD RUN THAT EXACT RISK IF THE ARBITRATION PROVISION WERE ENFORCEABLE, WHICH WE DON'T THINK IT IS.

BUT IF IT WERE ENFORCEABLE, IT CERTAINLY WOULDN'T ADVANCE THE INTERESTS OF PROMPT AND EFFICIENT RESOLUTION OF ANY CLAIMS WHERE THERE WOULD BE THAT RISK OF AN ADJUDICATION AGAINST APPLE

IN THE COURT AND AN ADJUDICATION AGAINST AT & T IN AN ARBITRATION THAT MIGHT CONCEIVABLY BE DIFFERENT.

IF ALL OF THE CLAIMS WERE ADJUDICATED IN THE SAME FORUM, WE THINK THAT RISK WOULD BE VIRTUALLY ZERO IF NOT PRACTICALLY ZERO.

THE COURT: WELL, LET'S NOT FACE THAT QUESTION YET. LET'S DETERMINE AND FOCUS ON THE QUESTION OF WHETHER OR NOT THIS IS AN ARBITRATION CLAUSE THAT IS VALID AND FOR THAT, WHAT I WANTED TO HAVE YOU FOCUS ON ARE THESE INCENTIVES.

THESE SEEM TO BE SOMETHING NEW AND DIFFERENT. YOUR OPPONENT DOES ARGUE THAT JUDGE ARMSTRONG'S JUDGMENT NOTWITHSTANDING THERE COULD BE A DIFFERENCE IN THE FACT THAT THESE INCENTIVES HAVE BEEN ADDED WHICH BRING THE CONSUMER IN A DIFFERENT POSITION THAN BEFORE.

WHAT DO YOU SAY ABOUT THAT?

MR. RIFKIN: WELL, I THINK TO PUT THAT ARGUMENT IN ITS CONTEXT AND TO UNDERSTAND JUDGE ARMSTRONG'S DECISION IN STIENER, WE HAVE TO TAKE A STEP BACK AND LOOK AT THE NINTH CIRCUIT DECISION IN SHROYER, WHICH IS THE CASE THAT INVALIDATED THE PRIOR AGREEMENT THAT AT & T AGREEMENT HAD, THE PRIOR ARBITRATION AGREEMENT, BECAUSE I THINK THAT LAYS OUT THE FRAMEWORK THAT ALL OF THIS HAS TO BE

ANALYZED IN.

AND I FIRST WANT TO CORRECT A MISIMPRESSION THAT MAY HAVE BEEN MADE BY MY OPPONENT. WE DO ABSOLUTELY ALLEGE BOTH PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY. AND LET ME EXPLAIN IT NOW BECAUSE SHROYER SETS THEM. SHORE SAYS THERE'S A THREE-PART TEST TO DETERMINE WHETHER A CLASS ACTION WAIVER IN A CONSUMER CONTRACT IS UNCONSCIONABLE.

THE FIRST PRONG IS WHETHER THE AGREEMENT IS A CONSUMER CONTRACT OF ADHESION WHICH SHROYER SAYS IS PROCEDURAL UNCONSCIONABILITY.

NOW, THERE'S NO QUESTION THAT UNDER CALIFORNIA LAW, WHICH THIS COURT OBVIOUSLY HAS TO APPLY UNLESS THERE'S SOME COMPELLING REASON FOR IT TO APPLY SOME OTHER STATE'S LAW.

UNDER CALIFORNIA LAW, THIS IS A CONTRACT OF ADHESION, AND I HAVE NOT HEARD AT & T ARGUE OTHERWISE. SO THAT SUBSTANTIVE UNCONSCIONABILITY PRONG AT LEAST IN CALIFORNIA AND EVERYWHERE ELSE IS AT LEAST ESTABLISHED.

THE OTHER PART IS SUBSTANTIVE CONSCIONABILITY. AND THE SHROYER TEST HAS TWO PARTS THERE. THE FIRST IS WHETHER THE AGREEMENT OCCURS IN THE SETTING IN WHICH DISPUTES PREDICTABLY

INVOLVE SMALL AMOUNTS OF DAMAGES, WHICH AGAIN, FOR EVERYBODY WHO BOUGHT AN IPHONE IS UNQUESTIONABLY THE CASE.

AND THEN THE SECOND PART OF THAT IS WHETHER THE PARTY WITH A SUPERIOR BARGAINING POWER CARRIED OUT A SCHEME TO CHEAT LARGE NUMBERS OF CONSUMERS OUT OF SMALL SUMS OF MONEY.

AND AGAIN, WITH RESPECT TO EVERYBODY WHO BOUGHT AN IPHONE, NO MATTER WHERE THEY BOUGHT AN IPHONE, THERE'S NO QUESTION THAT THIS SITUATION, THIS CASE MEETS BOTH OF THOSE TWO SUBSTANTIVE UNCONSCIONABILITY PRONGS.

MY OPPONENT MENTIONED SEVERAL TIMES THAT WE DID NOT MENTION PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY, AND I RESPECTFULLY DISAGREE.

THE COURT: THAT'S THIS CHEATING. WE ARE NOWHERE NEAR A FINDING THAT THERE HAS BEEN ANY CHEATING BUT WITH THE INCENTIVES BUILT IN, IT SOUNDS LIKE WHAT AT & T HAS DONE IS TO SAY IF YOU ACTUALLY TAKE US TO ARBITRATION, YOU'RE ACTUALLY GOING TO GET A BONUS.

I ACTUALLY DIDN'T PUT THAT FORMULA TOGETHER. I KEPT PROMISING MYSELF I WAS GOING TO TAKE THAT FORMULA AND WORK IT OUT BECAUSE IT IS A FORMULA THERE.

THERE HAS TO BE AN OFFER AND THE AMOUNT HAS TO REACH SOME THRESHOLD AND IT HAS TO DO WITH THE JURISDICTION OF THE COURT AND THEN YOU GET DOUBLE AMOUNT AND SOMEHOW THAT ALGORITHM HAS TO BE WORKED OUT, BUT I'LL ASSUME THAT THE DEFENDANT IS CORRECT THAT THAT OPERATES TO BE A BONUS.

LET'S ASSUME THAT IT IS, DOESN'T THAT TAKE AWAY SUBSTANTIVE UNCONSCIONABILITY?

MR. RIFKIN: WELL, THIS IS WHAT JUDGE ARMSTRONG FOLLOWED IN STIENER, AND I THINK IT'S THE CORRECT ANALYSIS AND SHOULD BE FOLLOWED HERE.

UNDER CALIFORNIA LAW THE DISCOVER BANK CASE THAT WE CITED IN OUR BRIEF, THE ISSUE ULTIMATELY TURNS ON WHETHER THE ARBITRATION CLAUSE BECOMES IN PRACTICE AN EXEMPTION FROM LIABILITY.

AND THE COURT BOTH IN SHROYER AND THE NINTH CIRCUIT AND THEN JUDGE ARMSTRONG IN STIENER CONCLUDED THAT BOTH THE PRIOR VERSION OF THE AT & T ARBITRATION PROVISION, AND THE NEW VERSION OF THE AT & T ARBITRATION PROVISION IN PRACTICE BECOME EXCULPATIONS FROM LIABILITY AND JUDGE ARMSTRONG'S ANALYSIS WENT AS FOLLOWS:

"NOTWITHSTANDING THE PREMIUM AND THE ATTORNEY PREMIUM," AND I THINK THE WAY IT WORKS, AND I'LL CONFESS IT'S RATHER COMPLICATED IN ITS

FORMATION, BUT I THINK THE WAY IT WORKS IS THIS: IF AT & T MAKES AN OFFER TO ANYONE WHO HAS AGREED AND GOES THROUGH THE TROUBLE OF DEMANDING AN INDIVIDUAL ARBITRATION AND AT & T LOSES IN THE ARBITRATION, THEN AT & T AGREES TO PAY A SPECIFIC DOLLAR AMOUNT, AND I THINK I HEARD SOME SUGGESTION THAT IN CALIFORNIA IT MAY BE $7500, BUT I THINK IT'S $5,000.

AND IN ADDITION TO THAT AT & T WOULD ALSO AGREE TO PAY SOME PREMIUM ON THE ATTORNEY'S FEE. AND THEY HAVE ADDED THIS AS A WAY OF GETTING AROUND WHAT WAS ORIGINALLY OBSERVED IN THE SHROYER CASE THAT THERE WAS NO INCENTIVE FOR ANYBODY TO BRING AN INDIVIDUAL CLAIM.

AND SO THEY ATTACK THIS CHANGE ONTO THE AGREEMENT TO TRY TO ANSWER THAT PROBLEM.

BUT JUDGE ARMSTRONG SAID, LOOK, THIS PREMIUM AND THIS ATTORNEY'S PREMIUM ARE VERY EASILY UNDONE.

IF AT & T SIMPLY MAKES AN OFFER OF A FULL SETTLEMENT TO THE HANDFUL OF CONSUMERS WHO ARE LIKELY TO DEMAND ARBITRATION, AND THE COST IN THOSE INSTANCES WILL BE OBVIOUSLY EXTREMELY SMALL FOR AT & T COMPARED TO THE ENORMOUS LIABILITY IT FACES IN A CLASS ACTION.

AND SO ON THAT BASIS JUDGE ARMSTRONG, QUITE CORRECTLY I BELIEVE, SAID WHAT IS REALLY AT STAKE HERE IS NOT THE FEW DAYS THAT AT & T MAY HAVE TO PAY TO A SMALL NUMBER OF INDIVIDUALS WHO GO TO THE TROUBLE OF BRINGING AN ARBITRATION IF THEY'RE EVEN AWARE OF THE ARBITRATION, AND I'LL ADDRESS THAT IN A MOMENT, BECAUSE THAT IS DWARFED BY THE POTENTIAL LIABILITY THAT AT & T HAS TO THE ENTIRE CLASS OF IPHONE CONSUMERS.

AND FOR THAT REASON JUDGE ARMSTRONG CONCLUDED, AND I BELIEVE CORRECTLY, AND I BELIEVE THERE'S NO REASON FOR THE COURT TO DISAGREE WITH JUDGE ARMSTRONG'S CONCLUSION, THAT WHAT THIS STILL IS, IS A PROVISION THAT IS INTENDED TO EXCULPATE AT & T AND INSULATE THEM FROM LIABILITY TO THE WHOLE GROUP OF CONSUMERS WHO THEY HARMED IN VERY SMALL INDIVIDUAL AMOUNTS AND THIS PREMIUM AND ATTORNEY'S PREMIUM ARE BOTH INADEQUATE AND SO EASY TO AVOID, OR AS JUDGE ARMSTRONG SAYS UNDO, THAT THEY SIMPLY DON'T OVERCOME THE STRONG PUBLIC POLICY PREFERENCE IN CALIFORNIA FOR CLASS ACTION ADJUDICATION AS OPPOSED TO INDIVIDUAL ARBITRATIONS.

I DID WANT TO MAKE A COMMENT ABOUT ONE OTHER ISSUE THAT YOUR HONOR RAISED WHEN MY OPPONENT WAS SPEAKING AND THAT HAD TO DO WITH WHEN THE

CONTRACT IS ENTERED INTO AT THE TIME THE IPHONE IS PURCHASED OR AT SOME LATER TIME.

IT'S NOT ENTERED INTO AT THE TIME OF PURCHASE AND AT LEAST WHEN THESE PHONES WERE SOLD IT WAS NOT. THE CONSUMER GOES INTO THE STORE AND BUYS A PHONE AND DOESN'T SEE ANYTHING UNTIL HE COMPLETES THE TRANSACTION FOR THE PHONE AND SIGNS UP FOR SERVICE WITH THE AT & T AND AT WHICH TIME HE'S GIVEN THE SUMMARY OF THE TERMS OF SERVICE. IN THE STORE THE SUMMARY TERMS OF SERVICE DOES NOT SET FORTH ANYTHING ABOUT THE ARBITRATION PROVISION.

THE ARBITRATION PROVISION DOESN'T APPEAR UNTIL THE CONSUMER TAKES THE PRODUCT HOME, TAKES THE IPHONE OUT OF THE BOX, CONNECTS THE IPHONE UP TO A COMPUTER, DOWNLOADS ITUNES IF HE HASN'T ALREADY DONE SO, AND INSTALLS THE NECESSARY SOFTWARE IN THE PHONE, REGISTERS THE PHONE FOR USE.

IN THE PROCESS OF THAT AT HOME TRANSACTION, THE CONSUMER THEN SEES A DIALOGUE BOX, WHICH SHOWS THE TERMS OF SERVICE.

AND IF A CONSUMER TAKES THE TIME TO SCROLL DOWN THAT DIALOGUE BOX FAR ENOUGH, THE CONSUMER WILL SEE AT THE VERY END, WILL SEE THIS ARBITRATION PROVISION. BUT THAT'S LONG AFTER THE TRANSACTION HAS ALREADY BEEN COMPLETED.

THE TRANSACTION IS COMPLETE IN THE STORE. AT NO POINT IN TIME IN THE STORE WERE ANY OF THESE PLAINTIFFS SHOWN OR TOLD ANYTHING ABOUT AN ARBITRATION PROVISION.

THE COURT: WELL, IN THE ELECTRONIC WORLD THAT WE LIVE IN, ISN'T THAT A BENEFIT TO THE CONSUMER? I MEAN, THE CONSUMER WANTS TO MAKE THE PURCHASE AND GET OUT OF THERE. IN THE GOOD OLD DAYS YOU WOULD HAVE TO STAND THERE AND AT THE STORE AND AT THE POINT IT WAS ACTIVATED RIGHT AT THE POINT OF PURCHASE.

SO WHAT AT & T HAS DONE IS TO PUT THE CONSUMER IN A GREATER CONVENIENCE BY ALLOWING IT TO HAPPEN LATER IN TIME AND ALL OF THESE TERMS, THERE ARE MULTIPLE TERMS THAT CONSUMERS CAN CHOOSE TO READ OR NOT.

BUT I GUESS WHAT BECOMES A PROBLEM FOR THE COURT AND THE ONE THAT YOU POINT OUT IN YOUR BRIEF IS IF THE CONSUMER HAPPENS TO SEE IT AND SAY, I DON'T LIKE THAT AND WANTS TO RETURN THE PHONE, THERE'S A PENALTY.

MR. RIFKIN: CORRECT.

THE COURT: BUT THAT'S NOT IMPOSED BY AT & T, IS IT?

MR. RIFKIN: WELL, THE PENALTY IS

CORRECTED BY AT & T OR WHOMEVER YOU BOUGHT THE PHONE FROM AND IF YOU BOUGHT THE PHONE FROM AT & T, WHICH FOR MANY OF THESE PLAINTIFFS WHO BOUGHT THE PHONE, THAT'S WHERE YOU HAVE TO PAY YOUR MONEY BACK TO. THEY WON'T TAKE THE PHONE UNLESS YOU PAY THE MONEY BACK. YOU ONLY GET SO MUCH BACK, BUT IT REALLY DOESN'T MATTER IF IT GOES TO APPLE OR AT & T.

THE COURT: SO AT & T WERE RESALING PHONES AS WELL AS APPLE?

MR. RIFKIN: OH, YES. IT REALLY DOESN'T MATTER THOUGH BECAUSE APPLE AND AT & T AGREED TO THIS. THIS WAS NOT SOMETHING THAT APPLE DID WITHOUT AT & T'S CONSENT.

IT WAS, FRANKLY, NOT SOMETHING THAT AT & T DID WITHOUT APPLE'S CONSENT. THEY AGREED TO THAT $50 OR $60 RESTOCKING FEE.

IT REALLY DOESN'T MATTER RESPECTFULLY. I RECOGNIZE THAT THERE IS SOME CONVENIENCE TO A CONSUMER NOT TO HAVE TO READ A CONTRACT IN THE STORE, BUT EVEN IF THEY HAD READ IT, UNDER THE CALIFORNIA LAW, THEY'RE NOT BOUND BY THAT ARBITRATION CLAUSE BECAUSE IT'S REPUGNANT TO CALIFORNIA PUBLIC POLICY.

AND WHETHER THEY KNEW ABOUT IT OR DIDN'T

KNOW ABOUT IS OF SOMEWHAT LESS IMPORTANCE. IN FACT, THEY HAVE NO CHOICE. THEY ARE BOUND BY IT. IT IS A CONTRACT OF ADHESION. THAT SATISFIES THE SUBSTANTIVE UNCONSCIONABILITY PRONG OF THE SHROYER ANALYSIS.

THE COURT: NOW, I'M PROBABLY PUTTING THIS A LITTLE BIT THE CART BEFORE THE HORSE BUT IT DOES IMPRESS ME THAT IF I'M IN A CASE THAT I HAVE TO PAY ATTENTION TO WASHINGTON LAW, NEW YORK LAW, CALIFORNIA LAW THAT AS A CLASS ACTION, I'M IN TROUBLE BECAUSE I DON'T HAVE A COMMON ISSUE OF LAW, DO I?

DOES, DOES -- DO I HAVE TO MAKE THE DECISION NOW THAT CALIFORNIA LAW IS THE LAW TO APPLY OR CAN I PROCEED WITH THIS -- WITH THREE SUBSTANTIVE LEGAL PRINCIPLES INVOLVED?

MR. RIFKIN: WELL, THERE ARE A NUMBER OF ANSWERS TO THAT.

THE FIRST ANSWER IS THAT THE QUESTION OF PROCEEDING AS A CLASS ACTION IS NOT BEFORE THE COURT RIGHT NOW.

THE ONLY QUESTION THAT IS PRESENTLY BEFORE THE COURT IS WHETHER THESE INDIVIDUAL PLAINTIFFS HAVE AGREED TO AN ENFORCEABLE ARBITRATION PROVISION.

AND ALTHOUGH THEY COME FROM DIFFERENT PARTS OF THE COUNTRY, AND AT & T HAS CHOSEN TO BRIEF CALIFORNIA LAW, NEW YORK LAW, AND WASHINGTON LAW, WE THINK THAT, THAT THE STARTING PLACE IS CALIFORNIA LAW, BECAUSE WE'RE HERE IN THIS FORUM, AND AS YOUR HONOR KNOWS, SINCE THE FEDERAL COURT IS SITTING HERE IN CALIFORNIA, IT HAS TO APPLY CALIFORNIA'S CHOICE OF LAW RULES, AS WELL AS CALIFORNIA LAW, UNLESS SOME OTHER LAW APPLIES.

WE THINK UNDER CALIFORNIA CHOICE OF LAW RULES, THE AOL VERSUS SUPERIOR COURT CASE THAT WE CITED IN OUR BRIEF, THE COURT, THE COURT WOULD NOT -- THE CALIFORNIA COURT WOULD NOT APPLY THE LAW OF ANY OTHER STATE TO ENFORCE AN ARBITRATION PROVISION IF THE APPLICATION OF THAT ARBITRATION PROVISION WOULD OPERATE AS A CLASS ACTION WAIVER UNLESS IT WAS DEMONSTRATED THAT THAT OTHER STATE HAD A MORE COMPELLING INTEREST IN THE CONTROVERSY THAN CALIFORNIA HAS IN THE CONTROVERSY.

AND WE HAVE ARGUED TO THE COURT AND WE BELIEVE THAT NEITHER WASHINGTON NOR NEW YORK HAVE A MORE COMPELLING INTEREST IN THE OUTCOME OF THE LITIGATION EVEN THOUGH SOME OF THE PLAINTIFFS, BUT NOT ALL OF THEM, EVEN THOUGH SOME OF THE PLAINTIFFS HAPPEN TO BE RESIDENTS OF OR HAD BILLING ADDRESSES

IN NEW YORK OR WASHINGTON.

THE COURT: NOW, I UNDERSTAND YOUR POSITION.

MR. RIFKIN: BUT EVEN MORE TO THE POINT, THERE'S NO DIFFERENCE BETWEEN LAW IN NEW YORK AND WASHINGTON AND CALIFORNIA.

WE CITED THE RENEERY VERSUS BELL ATLANTIC CASE WHICH SAYS THAT ARBITRATION PROVISIONS WHICH ARE CONTRACTS OF ADHESION ARE UNCONSCIONABLE AND UNENFORCEABLE.

AND WE CITED THE SCOTT VERSUS CINGULAR CASE, WHICH YOUR HONOR MENTIONED WHEN YOU WERE ASKING QUESTIONS OF MY OPPONENT, WHICH SAID THAT AN ARBITRATION PROVISION IS UNENFORCEABLE, IF, AND HERE ARE THE TWO PRONGS, IT MEETS TWO PRONGS, AND, NUMBER ONE, IT'S CONTRARY TO WASHINGTON'S POLICY FAVORING THE CONSUMER PROTECTION ACT, AND WHICH THIS WOULD BE; AND, NUMBER TWO, IT OPERATES AS AN EXCULPATORY CLAUSE WHICH IS, OF COURSE, THE TEST THAT STIENER AND SHROYER AND DISCOVER BANK APPLIED UNDER CALIFORNIA LAW.

THE COURT: AND YOU'RE NOT INVOLVED IN JUDGE ARMSTRONG'S CASE?

MR. RIFKIN: NO, I'M NOT. IN THE STIENER CASE, NO, I'M NOT.

THE COURT: DO YOU WANT TO SPEAK TO THE ISSUE THAT YOUR OPPONENT BROUGHT UP, NAMELY, THAT THEY'RE APPEALING ON THE GROUND THAT SHE SHIFTED THE BURDEN OF PROOF. I DON'T RECALL -- I DIDN'T CAPTURE ALL THAT WAS BEING CRITICIZED, BUT IS THAT SOMETHING THAT YOU'RE FAMILIAR WITH?

MR. RIFKIN: I THINK THEIR ARGUMENT IS THAT JUDGE ARMSTRONG SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT WHO WAS ADVOCATING THE UNCONSCIONABILITY, WHO WAS ADVOCATING THE ARBITRATION PROVISION, THAT IT WAS NOT UNCONSCIONABLE, AS OPPOSED TO REQUIRING THE PLAINTIFF, WHO WAS DEFENDING AGAINST THE ARBITRATION, THE MOTION TO ARBITRATE HAVING THAT BURDEN.

RESPECTFULLY, I THINK THE BURDEN DOES BELONG ON THE PARTY ASSERTING THE ARBITRATION PROVISION TO DEMONSTRATE ITS ENFORCEABILITY JUST LIKE ANY PARTY COMING INTO COURT TO ENFORCE THE TERMS OF ANY CONTRACT WOULD HAVE TO PROVE, NUMBER ONE, THERE WAS A CONTRACT; NUMBER TWO, THE CONTRACT WAS ENFORCEABLE; AND, NUMBER THREE, THE PARTY WHO WAS BEING CHARGED HAS SOMEHOW BREACHED THE CONTRACT. I DON'T SEE ANY DIFFERENCE.

THE COURT: I DO NOTE THAT THE PLAINTIFF

HERE HAS NOT MADE A MOTION WITH RESPECT TO THIS.

MR. RIFKIN: THIS IS AT & T'S MOTION AND SINCE THEY'RE TRYING TO ENFORCE THE ARBITRATION PROVISION, WE THINK IT'S THEIR BURDEN.

THE COURT: BUT YOU HAVE NOT ASKED ME TO MAKE A DECLARATION ONE WAY OR THE OTHER WITH RESPECT TO THIS.

MR. RIFKIN: WE HAVE NOT. WE BELIEVE THAT IT'S THEIR BURDEN, AS THE MOVANT, TO SHOW THAT THE PROVISION IS ENFORCEABLE, BUT, AGAIN, I SIMPLY COME DOWN TO THE FACT THAT IT REALLY DOESN'T MATTER WHOSE BURDEN THIS IS BECAUSE WHETHER IT'S THEIR BURDEN OR THE PLAINTIFF'S BURDEN AT THE END OF THE LINE THERE'S THE SHROYER CASE WHICH ESTABLISHES THE LAW AND JUDGE ARMSTRONG'S ANALYSIS IN STIENER, WHICH I THINK SIMPLY ECHOS THAT. AND THAT IS THE CHANGES ON THE MARGIN THAT AT & T HAS MADE TO THIS CONTRACT TO CREATE THIS PREMIUM AND THIS ATTORNEY PREMIUM DON'T OVERCOME THE FUNDAMENTAL FACT THAT THIS IS PRIMARILY AN EXCULPATORY CLAUSE.

THIS IS NOT A PREFERENCE FOR ARBITRATION VERSUS LITIGATION. IF IT WERE, THEN AT & T WOULDN'T REQUIRE A CLASS ACTION WAIVER.

THIS IS AN ATTEMPT BY AT & T TO EXCULPATE THEMSELVES FROM THE ENORMOUS LIABILITY THEY FACE IN

FAVOR OF VERY, VERY, VERY MODEST LIABILITY TO A HANDFUL OF CONSUMERS WHO WILL EVER CONCEIVABLY COMMENCE IN INDIVIDUAL ARBITRATIONS AND SO FOR THAT REASON I THINK JUDGE ARMSTRONG'S ANALYSIS IN STIENER CORRECTLY APPLIES THE NINTH CIRCUIT'S DECISION IN SHROYER TO THE EXACT SAME CONTRACT THAT IS IN FRONT OF YOUR HONOR NOW.

AND FOR THE POLICY REASONS THAT I ADDRESSED AT THE BEGINNING OF MY REMARKS, I JUST DON'T SEE THERE'S ANY BENEFIT TO ENFORCING THE ARBITRATION PROVISION HERE.

THE COURT: VERY WELL.

MR. RIFKIN: THANK YOU, YOUR HONOR.

THE COURT: MR. FALK, I INTERFERED WITH YOUR ARGUMENT WITH SO MANY QUESTIONS AND SINCE YOU'RE THE MOVING PARTY I DID WANT TO GIVE YOU AN OPPORTUNITY FOR A BRIEF REBUTTAL.

IS THERE ANYTHING YOU WOULD WISH TO HIGHLIGHT FOR ME?

MR. FALK: I'LL BE AS BRIEF AS I CAN, YOUR HONOR. I THINK I CAN BE QUITE BRIEF.

FIRST, YOUR HONOR, I RARELY HAVE BEEN IN A POSITION WHERE SOMEONE HAS RESISTED ENFORCEMENT OF THE CONTRACT BECAUSE THEY SAY IT'S TOO EASY FOR THE PLAINTIFF TO WIN IF THEY GO ACCORDING TO THE

AGREEMENT THAT THEY ENTERED INTO.

THAT SEEMS TO BE THE PROBLEM HERE IS THAT THE INDIVIDUAL PLAINTIFFS, ANYBODY WHO RAISES A DISPUTE IS LIKELY TO GET FULL RELIEF.

AND THE FOCUS UNDER THE FEDERAL ARBITRATION ACT AND UNDER CALIFORNIA, AND MOST OTHER STATES ON UNCONSCIONABILITY LAW, IS THE CIRCUMSTANCES OF THE PRESENT PARTY, NOT SOME HYPOTHETICAL EFFECTS ON SOME ABSENT PARTIES.

MOREOVER, THE --

THE COURT: I HESITATE TO DO THIS TO YOU BUT HERE'S THE QUESTION, WHAT IS IT THAT IS ARBITRATABLE THAT IS THE SUBJECT OF THIS CASE THAT WOULD BE THE SUBJECT OF FULL RELIEF BEING GIVEN IN THE CONTEXT OF THE ARBITRATION?

MR. FALK: ANY INJURY THAT HAS BEEN SUSTAINED BY ANY PLAINTIFF.

THE COURT: SO AN ANTITRUST INJURY WOULD BE ARBITRATABLE?

MR. FALK: YES.

THE COURT: SO WHAT WOULD BE THE ANTITRUST RELIEF THAT WOULD BE GIVEN IN THE COURSE OF THE ARBITRATION?

MR. FALK: WELL, I MEAN, CERTAINLY DAMAGES AND CERTAINLY -- THE SUPREME COURT HAS SAID

A NUMBER OF THINGS.

THE COURT: LET ME SEE IF I HAVE YOU. SO YOUR ARGUMENT IS UNDER THE ARBITRATION CLAUSE, THE ARBITRATOR WOULD BE ABLE TO AFFORD TO AN INDIVIDUAL PLAINTIFF FULL ANTITRUST DAMAGES SUSTAINED BY THAT CONSUMER?

MR. FALK: YES, YOUR HONOR, ABSOLUTELY. THERE'S NO QUESTION THAT THE ARBITRATOR HAS THE POWER TO, YOU KNOW, OR WHATEVER IS CONSISTENT WITH THE LAW AND THE SUPREME COURT HAS ADDRESSED THIS IN THE ANTITRUST CASE AND IN THE MITSUBISHI CASE SAYS ANTITRUST CLAIMS ARE ARBITRATABLE.

THE COURT: SO WHAT I HAVE IS ANTITRUST CLASS ACTION, ANTITRUST ACTION BEING ARBITRATABLE AND WILLING TO RAISE THE ISSUES AND PROVE RELEVANT MARKET, AND MARKET POWER AND ALL OF THE ISSUES THAT WOULD HAVE TO BE MOUNTED BY IN THE COURSE OF THIS LITIGATION WOULD BE DONE BEFORE THESE VARIOUS INDIVIDUAL ARBITRATORS EVERY INSTANCE WHERE A CONSUMER WOULD, AND THEN THERE'S NO RES JUDICATA THAT COMES OUT OF THAT.

IF THE CONSUMER WINS, THAT IS NOT -- DO I GET PRECLUSION SO THAT THEREAFTER APPLE WILL HAVE BEEN PRECLUDED SO THAT ANY OTHER CONSUMER WHO SUES FOR A VIOLATION OF ANTITRUST LAW WOULD SAY THAT'S

ALREADY BEEN LITIGATED, YOU LOSE ON LIABILITY AND LET'S JUST TALK DAMAGES?

MR. FALK: WELL, WITHIN THE ARBITRATION CONTEXT THAT'S NOT USUALLY THE WAY IT WORKS. IT WOULD CERTAINLY BE PERSUASIVE PARTICULARLY FOR THE SAME ARBITRATOR. THEY WOULD HAVE -- THEY'RE NOT CONFIDENTIAL ARBITRATIONS.

THE COURT: BUT THE ARBITRATION COULD BE MADE A JUDGMENT OF THE COURT.

MR. FALK: CERTAINLY IT COULD BE ENFORCED AND MADE A JUDGMENT OF THE COURT.

THE COURT: WOULD THAT BE PRECLUSIVE?

MR. FALK: I DO NOT BELIEVE IT WOULD GO BEYOND THE SCOPE OF THE ARBITRATION AGREEMENT, BUT I HAVE TO CONFESS THAT I HAVE NOT CONSIDERED THAT ISSUE FULLY WITHIN -- USUALLY BECAUSE THE ARBITRATION IS A CONTRACTUAL REMEDY, I DON'T BELIEVE IT WOULD BE PRECLUSIVE AGAINST OTHER PARTIES BUT, YOU KNOW, I HESITATE TO GIVE A DEFINITIVE ANSWER BECAUSE I HAD NOT --

THE COURT: WELL, THAT'S ANOTHER RIGHT THAT WOULD BE GIVEN UP IN THE ARBITRATION PROCESS.

MR. FALK: NOT BY THE CONSUMER THAT AGREED TO ARBITRATE. THE CONSUMER TO ARBITRATE WOULD GET FULL RELIEF.

THE COURT: WELL, THAT'S WHAT I'M TRYING TO FIGURE OUT, WHAT IS FULL RELIEF?

MR. FALK: I THINK IT'S --

THE COURT: BUT ANTITRUST IS TO THE COMPETITION TO THE MARKET. I'M HAVING DIFFICULTY CONCEPTUALLY WITH WHAT I WOULD BE ARBITRATING IN AN ANTITRUST CONTEXT. BUT, AGAIN, THESE ARE MATTERS THAT I'M JUST NOW STARTING TO THINK ABOUT.

I APPRECIATE THAT THIS IS A MOTION THAT INVITES ME TO MAKE A DECISION NOW. AND YOU WOULD WISH TO GET OUT OF THIS AND GO TO ARBITRATION NOW, OR AT LEAST YOUR CLIENT WOULD, BUT I'M NOT SURE I'M PERSUADED THAT I'M IN THAT POSITION AT THIS POINT. GO AHEAD.

MR. FALK: THE DIFFICULTY ISSUES WITH ANTITRUST LAWS AND HOW THOSE APPLY ARE SUPPOSED TO BE IN THIS INSTANCE ARE TO BE CONSIDERED BY THE ARBITRATOR. AND THE WHOLE POINT OF THE CASE IS TO HAVE IT ARBITRATED IN TRIBUNAL.

JUST VERY, VERY BRIEFLY. I NOTICE THE PLAINTIFFS DIDN'T SAY A WORD ABOUT NEW YORK AND UNCONSCIONABILITY LAW. THEY DIDN'T SAY THE HOLDING OF THE EERIE CASE THAT INDIVIDUAL OR/AND ARBITRATION OR CLASS WAIVERS ARE UNENFORCEABLE NOR DID THEY GIVE THE COURT MUCH REASON TO ARBITRATE A

NEW YORK PLAINTIFFS CLAIM UNDER CALIFORNIA LAW BECAUSE THE PLAINTIFF HAS SENT A LETTER TO CALIFORNIA TO FILE A LAWSUIT HERE OR HAS HAD A LAWSUIT TRANSFERRED HERE. THAT'S NOT THE WAY THESE THINGS USUALLY WORK.

IF THE STATE -- THERE IS A CHOICE OF LAW AGREEMENT AND EVEN IF THERE WERE NONE, THE STATE WITH THE GREATER CONTEXT OF THE NEW YORK PLAINTIFF TO THE WASHINGTON PLAINTIFF ARE THOSE OTHER STATES NOT CALIFORNIA. THERE'S NO JUSTIFICATION FOR APPLYING CALIFORNIA LAW THERE.

I POINT OUT THAT WITH RESPECT TO THE CONTRACTUAL PROCESS THERE'S A 14 DAY ABILITY TO RESCIND ON THE PART OF THE CONSUMER AND ALSO NO ONE HAS STATED THAT THEY WERE IN ANY WAY DETERRED FROM GETTING OUT OF THEIR CONTRACTS OR WANTED TO GET OUT OF THE CONTRACTS BUT WERE PRECLUDED OR DETERRED IN ANY WAY BY THE RESTOCKING FEE. AGAIN, THAT'S A HYPOTHETICAL CONCERN THAT IS NOT PRESENT IN THIS CASE.

THE COURT: THE 14 DAY RESCISSION WOULD BE WITHOUT PENALTY?

MR. FALK: THAT'S AT & T. THE RESTOCKING FEE IS A DIFFERENT ISSUE. SO THERE WOULD STILL BE IN MOST INSTANCES. IT'S FACTUALLY FAIRLY

COMPLICATED, AND I DON'T THINK IT'S FULLY VETTED IN THE RECORD WHAT ACTUALLY HAPPENED, BUT I THINK ON THIS RECORD THE RESTOCKING FEE WOULD STILL APPLY.

BUT WHAT I'M SAYING IS THAT NO ONE PLAINTIFF HAS SAID I DIDN'T LIKE THIS DEAL AND I WOULD HAVE GOTTEN OUT OF IT, BUT I WAS DETERRED BY THE RESTOCKING FEE.

NO ONE SAID THAT. SO THAT'S THE HYPOTHETICAL CONCERN THAT DOES NOT APPLY TO THESE INDIVIDUALS BUT OUR MOST IMPORTANT POINT, AND I'LL CLOSE WITH THIS, IS THAT INSTEAD OF LOOKING AT HOW THE ARBITRATION AGREEMENT APPLIES TO THE PLAINTIFFS HERE AND WHETHER IT GIVES THEM INCENTIVES AND GIVES THEM RELIEF AND WHETHER THEIR PROBLEMS COULD BE RESOLVED, THE PLAINTIFFS WANT TO TAKE INTO ACCOUNT EFFECTS ON OTHER PARTIES UNDER THE PUBLIC POLICY RUBRIC.

BUT THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF AGREEMENTS, AGREEMENTS AS THEY'RE WRITTEN. AND THEY COULD BE -- THAT ENFORCEMENT COULD BE WITHHELD ONLY ON GROUNDS THAT ARE APPLICABLE TO ALL CONTRACTS AND NOT ON SOME VAGUE -- CALIFORNIA PUBLIC POLICY DOESN'T TRUMP THE POLICY OF FEDERAL ARBITRATION. IT WORKS THE OTHER WAY. THE FEDERAL ARBITRATION ACT TRUMPS GENERAL

PUBLIC POLICY UNLESS IT'S THE SORT OF THING THAT WOULD STOP ANY CONTRACT WHATSOEVER.

AND GENERAL NOTIONS OF PUBLIC POLICY, IF THAT WERE ENOUGH, THEN THE FEDERAL ARBITRATION ACT IS TRULY ILLUSORY.

THANK YOU, YOUR HONOR.

MR. RIFKIN: YOUR HONOR, I HAVE ONLY ONE THING TO SAY BECAUSE I NEED TO CORRECT ANOTHER MISSTATEMENT ON THE PART OF MY ADVERSARY. THE FEDERAL ARBITRATION ACT DOES NOT SAY WHAT COUNSEL JUST SAID IT SAYS.

THE FEDERAL ARBITRATION ACT SAYS THAT CONTRACTS ARE CONTRACTS OR ARBITRATION AGREEMENTS ARE ENFORCEABLE, EXCEPT IF THEY'RE INVALID ON THE GROUNDS THAT WOULD APPLY TO ANY CONTRACT, NOT TO ALL CONTRACTS.

IT'S NOT LIKE WE HAVE TO COME UP WITH SOME UNIVERSAL UNENFORCEABILITY STANDARD. THAT'S THE ARGUMENT THAT AT & T MADE IN ITS REPLY BRIEF. THEY ARE SIMPLY WRONG.

THE WORD IN THE FEDERAL ARBITRATION ACT IS ANY, NOT ALL.

THE COURT: ALL RIGHT. WELL, LET'S -- LET ME HAVE UNDER SUBMISSION THIS QUESTION AND I APPRECIATE THAT IF GIVEN MORE TIME HERE YOU WOULD

ON ORAL ARGUMENT SAY MORE ABOUT THE MATTERS.

SO LET'S GO NOW TO THE MOTION THAT IS MADE BY APPLE TO DISMISS ALL OF THE PLAINTIFFS' CAUSES OF ACTION.

NOW, GIVEN THE CONTEXT OF THE LIMITED TIME WE HAVE HERE, I DON'T EXPECT YOU TO GO THROUGH ALL OF THOSE.

SO WHAT I WOULD HAVE YOU DO IS TO HAVE YOU TELL ME WHICH OF THE VARIOUS MOTIONS OR ISSUES IN THOSE MOTIONS YOU THINK WOULD BE MOST IMPORTANT FOR THE COURT TO HEAR ORAL ARGUMENT ON AND ADDRESS THOSE MATTERS.

MR. WALL: THANK YOU, YOUR HONOR. LET ME JUST SAY THAT I -- WHEN WE HAD THE LAST CMC YOUR HONOR HAD DECIDED TO SET THE ARGUMENT ON THESE MOTIONS SPECIALLY SO THAT THERE WOULD BE AMPLE TIME FOR YOU TO HEAR THE ANTITRUST ARGUMENT.

I AM A LITTLE BIT CONCERNED THAT WHAT WAS SUPPOSED TO BE A 20 MINUTE ARGUMENT TOOK NEARLY AN HOUR THAT WE'RE GOING TO BE SQUEEZED FOR TIME.

THE COURT: I WON'T SQUEEZE YOU FOR TIME AS LONG AS YOUR ARGUMENT IS PRODUCTIVE.

MR. WALL: OKAY.

THE COURT: MY MAIN CONCERN IS WHAT ISSUE DO YOU WANT ME TO --

MR. WALL: ABSOLUTELY.

THE COURT: SO THE REASON I SPECIALLY SET IT HAS TWO BENEFITS. ONE, IT MEANS THAT YOU'RE HERE AND THERE ARE NOT OTHER THINGS -- THERE IS ONE OTHER MATTER I HAVE. BUT BY MOVING IT, IT HAS ALSO BEHIND THE SCENES SHIFTED THE PERIOD OF TIME I WOULD HAVE TO REVIEW IT. SO THERE IS MORE TIME.

MR. WALL: AND THAT'S HOW MARKETS WORK, WHICH IS A REAL THEME FOR TODAY.

LET ME SAY I THINK THE CASE CAN BE DIVIDED INTO THREE PARTS: THE ANTITRUST PART, THE COMPUTER TRESPASS FRAUD PART, AND THEN THE SORT OF CONSUMER PROTECTION CLRA TYPE OF CLAIMS.

COUNSEL STARTED BY SAYING THAT THE HEART OF THE CASE IS THE ANTITRUST CASE SO I THINK THAT'S WHERE I WOULD BEGIN. IF WE HAVE SOME TIME WE CAN TALK ABOUT THE COMPUTER TRESPASS ISSUES AS WELL.

BUT LET'S START WITH THE ANTITRUST AND ON THE ANTITRUST CASE I THINK THE ISSUE IS VERY SIMPLE TO FRAME AND IT IS THIS IS A CHALLENGE TO A DISTRIBUTION STRATEGY, A DISTRIBUTION STRATEGY THAT APPLE HAD AT THE MOMENT IT ENTERED THE CELL PHONE BUSINESS.

THE ALLEGATIONS ARE VERY CLEAR THAT APPLE ANNOUNCED IT HAD AN AGREEMENT MAKING AT & T ITS

EXCLUSIVE PARTNER FOR IPHONE SERVICE. IT ANNOUNCED THAT AGREEMENT IN JANUARY OF '07.

THAT WAS NEARLY SIX MONTHS BEFORE APPLE ENTERED THE CELL PHONE BUSINESS BY INTRODUCING THE IPHONE IN JANUARY 29TH, 2007.

SO WHAT WE HAVE IS AN ENTRY STRATEGY. WE HAVE A SITUATION WHERE APPLE IN ZERO MARKET SHARE IN ANY CONCEIVABLE MARKET, WE DON'T EVEN NEED TO WORRY ABOUT MARKET DEFINITION, BECAUSE IN ANY CONCEIVABLE MARKET APPLE HAS ZERO MARKET SHARE, DECIDES IT WANTS TO INTRODUCE THIS NEW PRODUCT INTO ONE OF THE MOST VIBRANT COMPETITIVE MARKETS ON THE FACE OF THE EARTH, THE CELL PHONE MARKETS THAT ALL OF US KNOW ITS COMPETITORS IN OUR DAY-TO-DAY LIVES AND IT THINKS THAT THE BEST WAY TO DO THAT IS AN EXCLUSIVE PARTNERSHIP WITH ONE CARRIER AND IT HAPPENED TO HAVE PICKED AT & T.

NOW, THE QUESTION BEFORE THE COURT IS THERE ANY VIABLE LEGAL THEORY THAT CAN MAKE THAT ENTRY STRATEGY OF PARTNERING WITH AT & T EXCLUSIVELY AN ACT OF MONOPOLIZATION?

AND IT'S MONOPOLIZATION BECAUSE THE ONLY ANTITRUST CLAIMS IN THIS CASE ARE MONOPOLIZATION CLAIMS, SECTION II OF THE SHERMAN ACT CLAIMS.

THAT'S A VERY DELIBERATE DECISION BECAUSE

YOUR HONOR WILL REMEMBER WHEN THESE CASES WERE FIRST FILED THERE WERE ALL SORTS OF DIFFERENT THEORIES THROWN TOGETHER.

WHEN YOUR HONOR APPOINTED LEAD COUNSEL, THEY REVISED THE COMPLAINT. THEY THOUGHT THROUGH IT. THEY CAME IN EXCLUSIVELY WITH MONOPOLIZATION CLAIMS.

AND THOSE CLAIMS, AS COUNSEL REFERRED TO EARLIER, ARE PREDICATED ON THIS NOTION THAT THERE ARE THESE AFTER-MARKETS FOR IPHONE SERVICE AND IPHONE APPLICATIONS.

BUT BEFORE WE GET TO THAT, I THINK I WANT TO START AT FIRST PRINCIPLES AND BE SURE THAT WE'RE ALL CLEAR. ALL MONOPOLIZATION OFFENSES, ALL OF THEM COMBINE A CONDUCT ELEMENT WITH A MONOPOLY POWER ELEMENT.

IF THERE IS NOT EXISTING OR AT LEAST IMMINENT MONOPOLY POWER, IT REALLY DOESN'T MATTER WHAT THE CONDUCT IS BECAUSE THE FUNDAMENTAL BELIEF SYSTEM OF THE MONOPOLIZATION ANALYSIS UNDER THE SHERMAN ACT IS THAT IF A FIRM DOESN'T HAVE MONOPOLY POWER, IT IS SUBJECT TO MARKET DISCIPLINES THAT ARE A BETTER SYSTEM OF REGULATING ITS CONDUCT THAN JUDICIAL INTERVENTION THROUGH ANTITRUST CASES.

AND LET ME GIVE YOU AN EXAMPLE BECAUSE I

SAW A COMMERCIAL ON TELEVISION THIS WEEKEND FOR A NEW PRODUCT CALLED MOTOROLA ROCKER. IT'S A CELL PHONE FROM MOTOROLA, AND I GUESS THE SECRET SAUCE OF THIS CELL PHONE IS THAT IT HAS A VERY GOOD MUSIC PLAYER ON IT HENCE "THE ROCKER."

IT'S AVAILABLE ONLY THROUGH T-MOBILE. IF YOU WANT TO GET THE ROCKER, YOU HAVE TO SIGN UP FOR T-MOBILE SERVICE.

NOW, NOT EVERY CONSUMER IS GOING TO LIKE THAT.

THERE ARE GOING TO BE PLENTY CONSUMERS KIND OF LIKE THE PLAINTIFF IN THIS CASE ARE GOING TO BE ABLE TO MIX AND MATCH. THEY'RE GOING TO WANT THE MOTOROLA ROCKER BUT THEY'RE GOING TO WANT AT & T SERVICE OR THEY'RE GOING TO WANT VERIZON SERVICE.

BUT UNDER ANTITRUST THEORY WE ALLOW MOTOROLA TO DISTRIBUTE THE ROCKER IN AN EXCLUSIVE PARTNERSHIP WITH WHOMEVER IT FEELS LIKE BECAUSE THE THEORY IS THAT WITHOUT MONOPOLY POWER, WITHOUT THE POWER TO FORCE CONSUMERS TO TAKE THAT PRODUCT AGAINST THEIR WILL, THE MARKET WILL ADEQUATELY DISCIPLINE. TO THE EXTENT THAT THAT IS AN ATTRACTIVE PRODUCT COMBINATION, THEY'LL DO WELL.

TO THE EXTENT THAT THERE ARE SOME

CONSUMERS WHO THINK THAT THE COST OF HAVING TO TAKE T-MOBILE SERVICE IS TOO GREAT, THEY'LL LOSE SALES.

THE COURT: NOW, LET ME JUMP IN AT THIS POINT BECAUSE UP TO NOW I THINK I'M IN GENERAL AGREEMENT WITH EVERYTHING THAT YOU HAVE SAID BECAUSE PREMISED IN YOUR ARGUMENT IS THE NOTION THAT THE CONSUMER KNOWS, THE CONSUMER BUYS THE PRODUCT KNOWING OF THE TIE TO AT & T AND MAKES A CHOICE AND COULD MAKE OTHER CHOICES.

THE PLAINTIFF'S CONTENTION IS THAT THERE ARE ASPECTS OF THE AT & T AND APPLE CONTRACT WHICH IS UNKNOWABLE BY THE CONSUMER AND THAT MARKET POWER IS CREATED AT THE PURCHASE, AND, THEREFORE, THIS UNKNOWABLE ELEMENT AFFECTS THE CONSUMER AFTER THE PURCHASE HAS TAKEN PLACE.

MR. WALL: RIGHT.

THE COURT: AND IF IT'S UNKNOWABLE, IT GIVES CONTROL OF THE CONSUMER IN A FASHION THAT THE CONSUMER CANNOT CHOOSE NOT TO BE IN BECAUSE THE CONSUMER DOESN'T KNOW ABOUT IT.

I'M SAYING THESE THINGS THAT IS VERY COLLOQUIAL, BUT I'M TRYING TO GET TO THE QUESTION OF WHAT ABOUT THAT?

MR. WALL: WELL -- AND THAT IS THE ESSENCE OF THIS CONCEPT OF AN AFTER-MARKET AND THE

ESSENCE OF THE KODAK CASE AND SOME OF THE OTHER CASES THAT HAVE TO DO WITH THAT.

THE CRITICAL THING ABOUT THAT IS -- THERE'S -- IT COULD ABSOLUTELY BE THAT SOME DAY AFTER-MARKETS WILL ARISE FOR AN IPHONE. IT IS IN THE NATURE OF ALL DURABLE GOODS THAT THERE IS A POSSIBILITY THAT THERE IS AN AFTER-MARKET THAT ARISES SOME DAY.

AND SHOULD IT EVER BE THE CASE THAT AN AFTER-MARKET ARISES AND APPLE UNDER THE STANDARDS OF THE SUPREME COURT HAS LAID DOWN IN KODAK COULD BE FOUND TO HAVE IN THAT AFTER-MARKET, THEN FROM THAT POINT FORWARD, APPLE WILL HAVE TO MODIFY ITS CONDUCT AND MODIFY ITS CONDUCT TO BE SURE THAT IT IS CONSISTENT WITH THE RESTRICTIONS THAT THE LAW PLACES ON THE BEHAVIOR OF MONOPOLISTS.

JUST AS IT IS THE CASE THAT IF IN A, YOU KNOW, IN A PERFECT WORLD EVERYONE BOUGHT AN IPHONE.

THE COURT: SO IS YOUR ARGUMENT THAT THE CLAIM IS NOT RIPE?

MR. WALL: IT'S NOT -- IN A SENSE THAT'S IT. I MEAN, THAT'S GETTING TO THE POINT. THE POINT IS THAT A CLAIM OF AFTER-MARKET MONOPOLIZATION IS PREMATURE. IT CAN'T -- IT COULDN'T HAVE EXISTED.

MY POINT IS THAT THEY ARE ATTACKING AN ENTRY STRATEGY. THIS IS ACTUALLY THE LEMMON CASE. THIS IS THE EASIEST CASE THAT THERE COULD BE BECAUSE THEY'RE TALKING ABOUT THE ACTUAL DISTRIBUTION STRATEGY BY WHICH APPLE ENTERED THE BUSINESS IN WHICH IT MAKES NO SENSE WHATSOEVER TO THINK THAT APPLE COULD HAVE MONOPOLY POWER.

AND WHAT THE PLAINTIFF IS ASKING YOUR HONOR TO DO IS SAY, SURE, THEY HAD 0 PERCENT OF THE CELL PHONE MARKET AND, SURE, EVEN AT & T, WHICH HAS BEEN IN BUSINESS FOR A LONG TIME, DOESN'T HAVE ANYTHING CLOSE TO A MONOPOLY SHARE OF THE SERVICE MARKET. THEY HAVE A MARKET SHARE IN THE TWENTIES OR SOMETHING LIKE THAT. IT'S NOT EVEN IN THE BALL PARK OF MONOPOLY POWER.

SO EVEN THOUGH THERE'S INDISPUTABLY NO MONOPOLY POWER IN THE TWO MOST LOGICAL MARKETS THAT ARE IMPLICATED BY THIS CONDUCT, LOOK AT IT ANOTHER WAY. THINK ABOUT THE POSSIBILITY THAT AT THE INSTANT OF TIME WHEN SOMEBODY BOUGHT THE IPHONE, THAT THAT'S WHEN THE AFTER-MARKET WAS CREATED.

SO THE AFTER-MARKET IS A PRESENT MARKET. RESPECTFULLY THAT'S OVERTHINKING IT. THAT IS REALLY OVERTHINKING THIS BECAUSE --

THE COURT: WELL, LET'S THINK ABOUT IT.

YOUR ARGUMENT IS THAT AS A MATTER OF LAW A PLAINTIFF CANNOT STATE A CLAIM FOR MONOPOLY AND ANTITRUST VIOLATION IF AT THE POINT OF PURCHASE THE CONSUMER IS TOLD THAT YOU HAVE TO BUY THIS SERVICE FOR TWO YEARS?

MR. WALL: RIGHT.

THE COURT: BUT IN REALITY THE CONSUMER MUST BUY THE SERVICE FOR SUBSEQUENT YEARS. AND THEN UNTIL THE SUBSEQUENT YEARS COME, THAT THERE IS NO EXERCISE OF, OF POWER --

MR. WALL: RIGHT.

THE COURT: -- OVER THE CONSUMER BECAUSE YOU HAVE TO WAIT FOR THAT TO HAPPEN. YOU CANNOT ALLOW A CLAIM TO BE TRIED IN COURT BASED UPON THE INEVITABILITY OF THE TWO-YEAR PERIOD.

TIME IS GOING TO KEEP MOVING INEVITABLY, BUT YOU CANNOT STATE A CLAIM NOW FOR SOMETHING THAT INEVITABLY HAPPENS AT THE END OF THE TWO-YEAR PERIOD.

MR. WALL: INDEED. AND WHAT THE POINT -- AND THAT'S WHY I STARTED WITH FIRST PRINCIPLES AND I GO BACK TO FIRST PRINCIPLES.

ALWAYS IN MONOPOLIZATION LAW THE CONDUCT MUST BE MARRIED TO THE MONOPOLY POWER.

IT IS NOT EVER ALLOWABLE TO SAY THAT YOU

DIDN'T HAVE MONOPOLY POWER WHEN YOU DID THAT AND YOU WERE SUBJECT TO MARKET DISCIPLINE WHEN YOU DID THAT, BUT WE'RE GOING TO SAY THAT IT IS ILLEGAL NOW BECAUSE OF WHAT MAY OR MAY NOT HAPPEN IN THE FUTURE.

THE COURT: IT IS NOT A MAY OR MAY NOT. THIS IS CONTRACTUAL. IT'S TECHNOLOGICALLY BUILT INTO THE PHONE.

MR. WALL: RIGHT.

THE COURT: AND IT IS CONTRACTUALLY BUILT INTO THE RELATIONSHIP THAT THE CONSUMER IS TIED IN A WAY THAT, THAT MAKES AT & T THE ONLY SERVICE THAT THE CONSUMER COULD GO TO.

MR. WALL: ABSOLUTELY.

THE COURT: AT THE END OF THE TWO-YEAR CONTRACT.

MR. WALL: RIGHT. AND IT'S ON THE BACK OF THE BOX. IT SAYS RIGHT THERE ON THE BACK OF THE BOX IT SAYS BOTH AT A MINIMUM TWO-YEAR WIRELESS SERVICE PLAN WITH AT & T IS REQUIRED AND THAT A SERVICE PLAN WITH AT & T IS REQUIRED FOR CELLULAR NETWORK CAPABILITIES UNTIL EXPIRATION OF THE INITIAL TWO-YEAR PLAN. IT'S ALL UPFRONT.

IT'S THE DEAL THAT PEOPLE LINED UP TO SIGN UP TO. THAT'S THE DEAL.

THE COURT: ALL RIGHT. WELL, I'LL TAKE YOUR ARGUMENT BECAUSE I'M NOT SURE THAT WAS THE FEATURE, BUT I'LL HAVE TO ASSUME THAT.

MR. WALL: TRUST ME, I REPRESENT APPLE. IT WAS THE PHONE. THEY WANTED THE PHONE. NO DISRESPECT. IT WAS THE PHONE.

BUT THE POINT IS THAT, YOU KNOW, THE WAY THIS WORKED, COUNSEL DESCRIBED THE PROCESS HERE, THIS WAS A REAL NICE PAPER WEIGHT UNTIL YOU ACTIVATED IT BY SIGNING IT UP FOR AT & T SERVICE.

SO THE FOREMARKET TRANSACTION IN KODAK PARLANCE, YOU HAVE FOREMARKET TRANSACTIONS AND AFTER-MARKET TRANSACTIONS. THE FOREMARKET TRANSACTION WAS THIS PHONE ACTIVATED WITH AT & T SERVICE.

AND WHAT ALL OF THESE CASES SAY IS THAT WHATEVER HAPPENS UPFRONT, WHATEVER HAPPENS AT THAT INITIAL POINT OF PURCHASE, THE ANTITRUST ANALYSIS IS DID YOU HAVE MONOPOLY POWER AT THAT TIME?

THE COURT: WELL, LET'S GO TO KODAK BECAUSE THERE YOU HAD A CIRCUMSTANCE WHERE THE MARKET WAS INDEPENDENT SERVICE PROVIDERS WHO WOULD SERVICE MACHINES AND SERVICE AND GET PARTS FOR MACHINES.

BUT I'LL HAVE TO GO BACK TO THE CASE AND

LOOK.

WASN'T THAT A CONDITION THAT EXISTED AT THE POINT OF PURCHASE THAT KODAK HAD ALREADY BUILT INTO ITS SERVICE AGREEMENT WHICH IT WAS SELLING WITH THE MACHINE?

THAT WAS A TYING CASE SO IT WASN'T QUITE THE SAME AS WHAT WE'RE DEALING WITH HERE, BUT WEREN'T THOSE CONDITIONS, HOWEVER, IMPOSED AT THE VERY POINT OF THE BEGINNING?

NOW, THAT'S ONE -- THAT'S ONE ASPECT OF WHAT YOUR ARGUMENT IS. BUT I WANT TO BE CLEAN ABOUT THIS. YOUR ARGUMENT IS THAT THERE CAN BE NO MONOPOLY POWER EXERCISED AT THE POINT OF PURCHASE.

MR. WALL: AT THE POINT OF ENTRY IS WHAT WE'RE SAYING HERE.

THE COURT: WELL, WHAT DO YOU MEAN "ENTRY?

MR. WALL: WHAT WE'RE SAYING THIS IS NOT AN ATTACK. THIS IS NOT AN ATTACK ON THE PURCHASE OF THE IPHONE.

IT'S ON AN EXCLUSIVITY AGREEMENT WITH AT & T, WHICH THE PLAINTIFFS SAY LIMIT THE SERVICE. AND THIS WAS A PREDECISION BY APPLE AND AT & T AS AN INITIAL DISTRIBUTION STRATEGY.

AND, YES, WHAT I'M SAYING IS THAT THERE'S

NO ANTITRUST THEORY OF ANY KIND THAT CAN SAY THAT AN ENTRY STRATEGY IS AN ACT OF MONOPOLIZATION ON THE THEORY THAT SOME DAY YOU MIGHT BE ABLE TO, TO -- AND WE DON'T KNOW BECAUSE THE FUTURE IS UNPREDICTABLE BUT SOME DAY YOU MIGHT BE AN AFTER-MARKET ANALYSIS.

AND WE QUOTED IN OUR REPLY BRIEF A STATEMENT FROM PROFESSOR HOVENCAMP AND HIS ANTITRUST TREATISE WHICH SAY, OF COURSE, THIS THEORY DOES NOT APPLY TO WHATEVER WAS PURCHASED UPFRONT.

I MEAN, THIS IS -- THE PHRASE, YOUR HONOR, AFTER-MARKET, THE FACTUAL PATTERN IN KODAK -- AND BY THE WAY, I LOST THE KODAK CASE SO I CAN TALK YOUR EAR OFF FOR A LONG TIME ABOUT WHAT THAT WAS.

THE SUPREME COURT WENT OUT OF ITS WAY IN THAT CASE TO EMPHASIZE THE FACT THAT KODAK HAD ACTUALLY CHANGED ITS AFTER-MARKET POLICIES YEARS AFTER PEOPLE BOUGHT THEIR COPIERS FROM ONE IN WHICH IT FACILITATED INDEPENDENT SERVICE TO ONE IN WHICH IT CUT OFF THE SUPPLY OF PARTS.

AND IT WAS A CRITICAL POINT FOR THE COURT BECAUSE IT WAS SAYING, IT DIDN'T MATTER HOW KNOWLEDGEABLE A CONSUMER WAS AT THE BEGINNING. IT

WAS IMPOSSIBLE TO KNOW THAT, THAT THEY WERE GOING TO FACE A MONOPOLIZED AFTER-MARKET BECAUSE KODAK DIDN'T DO THAT UNTIL YEARS LATER.

HERE YOU HAVE THE OPPOSITE SET OF CIRCUMSTANCES WHERE THIS PRODUCT AND THE NECESSITY THAT IS ON THE BOX TO GET AT & T SERVICE AND TO RENEW THAT CONTRACT WITH AT & T IS COMPLETELY UPFRONT.

AND IT'S, IT'S AN ENTRY STRATEGY. IT TAKES PLACE AT A TIME WHEN -- I THINK OF THIS AS THE REALITY CHECKPOINT.

YOU KNOW, SOMETIMES WITH MARKET DEFINITION, WE CAN SORT OF TIE OURSELVES INTO KNOTS ABOUT WHAT IS POSSIBLE BUT THEY -- HOW COULD APPLE UNDER ANY THEORY HAVE BEEN A MONOPOLIST AT THE MOMENT OF ENTRY? THAT MAKES ABSOLUTELY NO SENSE.

WE CAME IN WITH ZERO MARKET SHARE.

THE COURT: IT DEPENDS ON YOUR DEFINITION OF THE MARKET THOUGH, DOESN'T IT?

MR. WALL: THAT'S THE POINT. THE PLAINTIFFS WANT TO SAY THAT IT DEPENDS ON THE DEFINITION OF THE MARKET.

WHAT I'M SAYING IS REALITY CHECK. HOW IS IT POSSIBLE LOGICALLY? HOW IS IT POSSIBLE IN NATURE, THAT SOMEBODY AT THE MOMENT OF THEIR FIRST

ENTRY INTO A CROWDED MARKET HAD MONOPOLY POWER?

BECAUSE WHAT THE PLAINTIFF IS PROVIDING IS A SEMANTIC ANSWER. AND IT'S A SEMANTIC ANSWER WHICH DOESN'T HOLD UP UNDER THE ANALYSIS OF KODAK AND ICON AND THESE OTHER CASES.

BUT A SEMANTIC ANSWER SHOULD NEVER WORK UNDER ANY CIRCUMSTANCES. IT SHOULD NOT BE ALLOWED TO CHANGE THE REALITY THAT A NEW ENTRANT CANNOT BE A MONOPOLIST.

THE COURT: PART OF THE STRENGTH OF YOUR ARGUMENT IS THE POINT YOU JUST MADE, AND I WANT TO HEAR FROM YOUR OPPONENT ON IT IS THAT THIS IS ALL DISCLOSED.

LET'S MOVE TO ANOTHER ASPECT OF IT THAT IS NOT DISCLOSED. WHAT I UNDERSTAND TO BE APPLE'S PRACTICE OF DISABLING THE PHONE, IF THERE IS THIRD PARTY SOFTWARE.

MR. WALL: THAT'S NOT, THAT'S NOT REALLY WHAT APPLE'S PRACTICE IS.

THE ALLEGATION IS THAT APPLE RELEASED AN UPDATE TO ITS OPERATING SYSTEM, VERSION 1.1.1.

THAT IF A CONSUMER WHO HAD UNLOCKED ITS PHONE THROUGH HACKING SOFTWARE, NOT SOMETHING THAT APPLE PROVIDED BUT SOMETHING THAT THEY DOWNLOADED OFF THE INTERNET.

IF THEY HAD UNLOCKED THEIR PHONE AND THAT THERE WAS AN INCOMPATIBILITY WITH THE NEW OPERATING SYSTEM.

AND WHAT THE PLAINTIFFS ARE CLAIMING IS THAT APPLE RELEASED THAT OPERATING SYSTEM KNOWING THAT IT WOULD NOT BE COMPATIBLE WITH SOME UNLOCKED IPHONES.

THE COURT: NOT ONLY THAT, BUT THAT IT WOULD ACTUALLY UNNECESSARILY DESTROY THE --

MR. WALL: LET ME BE VERY CLEAR ABOUT THIS BECAUSE THERE WAS, THERE WAS A -- I'M CONSTRAINED ON WHAT I COULD SAY IN AGREEMENT WITH COUNSEL. BUT THERE WAS A DIALOGUE WITH PLAINTIFFS ABOUT WHAT IT WAS THAT THEY WERE ALLEGING AND WHAT THEY WERE NOT ALLEGING.

AND THE COMPLAINT WAS REVISED. THE COMPLAINT BEFORE YOU IS CALLED THE REVISED CONSOLIDATED AMENDED COMPLAINT. AND IF YOU LOOK AT THE DIFFERENCES BETWEEN THE REVISED CONSOLIDATED AMENDED COMPLAINT AND THE IMMEDIATELY PRECEDING COMPLAINT, YOU WILL SEE THAT THEY DELETED ANY ALLEGATIONS OF A CONSCIOUS OBJECTIVE TO DISABLE IPHONES.

WHAT -- ALL THAT THEY ARE SAYING IS THAT WE KNEW THAT THE REVISED OPERATING SYSTEM WOULD BE

INCOMPATIBLE WITH CERTAIN UNLOCKED IPHONES.

NOW, THE IRONY IS THE REASON THAT THEY SAY WE KNEW ABOUT IT IS BECAUSE THERE WAS AN EXPLICIT WARNING ON THE APPLE WEB SITE THAT WHEN YOU WENT TO DOWNLOAD VERSION 1.1.1 AND WE HAVE SCREEN SHOTS IN OUR BRIEFS, THERE'S, FRANKLY, A SCARY LOOKING WARNING THAT SAYS THAT IF YOU HAVE ALTERED YOUR IPHONE, DOWNLOADING THIS SOFTWARE MAY DISABLE IT.

THE COURT: MAY OR WOULD.

MR. WALL: MAY -- BECAUSE I'M TRYING TO STAY WITHIN THE COMPLAINT BUT IF I CAN JUST FOR CONTEXT, THE PROBLEM HERE, WHAT HAPPENED IS THAT ONE OF THE UNLOCKING SOLUTIONS THAT WAS PROPAGATED ON THE INTERNET CORRUPTED A FILE IN THE IPHONE'S FIRMWARE.

THE TECHNIQUE OF HOW IT UNLOCKED THE PHONE INVOLVED CORRUPTING A FILE IN THE FIRMWARE.

AND THE NEW OPERATING SYSTEM COULDN'T WORK WITH THAT CORRUPTED FILE.

THE COURT: NOW, CAN I JUST TAKE THAT PART OF THE CASE AND SAY LET'S JUST LEAVE THAT FOR LATER BECAUSE I NEED TO KNOW A LOT OF FACTS. THIS IS A 12(B)(6) MOTION. WHY SHOULD I BOTHER IN TRYING TO GET RID OF THAT PART OF THE CASE ON THE

PLEADING?

MR. WALL: I, FRANKLY, THINK, YOUR HONOR, IT IS THE SINGLE EASIEST PART OF THE CASE TO GET RID OF ON THE PLEADINGS BECAUSE OF THE TWO CLAIMS THAT ARE MADE ABOUT IT WHICH ARE COMPUTER TRESPASS, THE COMMON LAW, COMPUTER TRESPASS.

THE COURT: WHY IS THAT SO EASY?

MR. WALL: BECAUSE THERE'S NO AUTHORITY ANYWHERE FOR THE PROPOSITION THAT IT IS A TRESPASS, WHICH IS AN INTENTIONAL TORT THAT IT IS A TRESPASS TO PUT INTO COMMERCE AN OTHERWISE PERFECTLY USEFUL PIECE OF SOFTWARE. NOBODY CLAIMS THAT VERSION 1.1.1 WAS ANYTHING THAN AN ORDINARY PIECE OF SOFTWARE.

THE CLAIM IS THAT IT'S A TRESPASS BECAUSE CONSUMERS WHO DOWNLOADED IT AND HAD THEMSELVES MODIFIED THEIR PHONES, COULDN'T USE THE DEVICE ANY LONGER.

A TRESPASS IS AN INTENTIONAL TORT WHERE I HAVE GONE TO ANOTHER PERSON'S PROPERTY -- EXCUSE ME -- I GO ONTO ANOTHER PERSON'S PROPERTY AND I DO SOME HARM.

THE COURT: YOU DON'T HAVE TO DO ANY HARM.

MR. WALL: I DON'T HAVE TO DO ANY HARM

BUT I HAVE TO --

THE COURT: THE TRESPASS IS THE DAMAGE. IN OTHER WORDS, IT SEEMS TO ME THAT THE REASON THAT I WANTED TO DEFER THIS IS THAT I NEED TO UNDERSTAND BETTER BECAUSE I SAID "UNNECESSARILY DISABLED."

IN OTHER WORDS, IF THE ALLEGATION IS THAT IT MIGHT HAVE ACCIDENTALLY DONE IT, THAT MIGHT TAKE A DIFFERENT TACT BUT IT SEEMS TO ME THAT THE TRESPASS IS COMMITTED IF THE 1.1, WHATEVER, UPDATE GOES TO PLACES THAT IT NOT NECESSARILY NEED TO GO AND UPDATES AND DOES THINGS TO THE PHONE THAT DISABLES IT WHEN INDEED IT COULD VERY WELL DO ITS WORK WITHOUT THAT.

MR. WALL: BUT THE POINT IS THAT THE COURTS HAVE BEEN VERY CAREFUL ABOUT EXTENDING THE TRESPASS DOCTRINE TO DAMAGING COMPUTERS.

AND THE KEY CASES WHICH ARE THE INTEL VERSUS HAMIDI, H-A-M-I-D-I, AND THE E-BAY VERSUS BITTERS EDGE CASE, THOSE WERE SITUATIONS IN WHICH YOU WERE DEALING WITH SPAMMING AND YOU WERE DEALING WITH THE USE OF BOTS TO GO INTO SOMEBODY ELSE'S COMPUTER. SO SOMEONE FROM AFAR ENTERED THE PLAINTIFF'S COMPUTER WITHOUT ANY AUTHORIZATION.

THE COURT: YES.

MR. WALL: THIS IS A SITUATION IN WHICH

THE PLAINTIFFS CHOSE TO DOWNLOAD A NEW PRODUCT.

THE COURT: FOR A PURPOSE.

MR. WALL: FOR A PURPOSE. AND WHAT THEY'RE TRYING TO READ INTO THAT IS ESSENTIALLY AN IMPLIED WARRANTY THAT IT WILL WORK WITH ALTERED DEVICES.

THE COURT: YES, BUT, YOU KNOW, THIS IS ELECTRONICS, AND I HATE TO USE THESE TERMS BUT AN INVITEE CAN TRESPASS.

MR. WALL: THERE'S NO QUESTION THAT AN INVITEE CAN TRESPASS.

THE COURT: SO IF I LET YOU IN AND I SAY DON'T GO TO THAT ROOM AND YOU COME IN WITH THE IDEA THAT YOU'RE GOING TO USE MY PROPERTY PERMISSIBLY BUT YOU GO TO A ROOM THAT YOU DON'T NECESSARILY HAVE PERMISSION TO GO TO AND YOU DO SOMETHING THERE THAT IS HARMFUL.

AND I AGREE WITH YOU GOING INTO THE ROOM MAY NOT BE ENOUGH, BUT I THINK IT'S A TRESPASS JUST TO GO TO THE ROOM, THEN, PERHAPS, THAT CLAIM IS VIABLE.

BUT I THINK I HAVE ENOUGH TO DO WITHOUT WORRYING ABOUT THAT, ALTHOUGH YOU SAY IT'S EASY. IF IT'S SO EASY THEN I'LL WAIT UNTIL LATER TO DO IT AND FOCUS ON THE HARD JOB WHAT YOU'RE GIVING ME

HAVING TO DO WITH THESE ANTITRUST CLAIMS.

MR. WALL: LOOK, I HAVE DONE THIS LONG ENOUGH TO KNOW HOW TO TAKE A LEAD.

HOW CAN I HELP FURTHER ON THE ANTITRUST CLAIM BECAUSE I DO THINK IT'S TRANSFORMATIVE?

THE COURT: I THINK YOU HAVE MADE AN EFFECTIVE ARGUMENT AND YOU CAN USE THE REST OF YOUR TIME COMING BACK.

MR. WALL: THANK YOU.

MR. RIFKIN: THANK YOU AGAIN, YOUR HONOR. I'M WARMED UP. WE HAVE A DISAGREEMENT WITH APPLE ABOUT THE NATURE OF THE CLAIM AND ABOUT WHAT WE'RE REALLY CHALLENGING AND THE CONDUCT THAT WE THINK VIOLATES THE ANTITRUST LAWS.

MY OPPONENT HAS CHARACTERIZED THE COMPLAINT AND IN THEIR REPLY BRIEF THEY CHARACTERIZE THE COMPLAINT AS ONE THAT CHALLENGES APPLE'S ENTRY STRATEGY INTO THE HYPER COMPETITIVE CELL PHONE MARKET.

WE DO NO SUCH THING, AND WE HAVE NEVER DONE SUCH THING. AND THERE WERE OTHER PLAINTIFFS AND PLAINTIFF'S COUNSEL WHO AT A TIME MAYBE THOUGHT ABOUT THAT.

OUR POSITION HAS ALWAYS BEEN WAS THAT THERE WAS NOTHING WRONG WITH APPLE'S DECISION TO

ENTER THE MARKET THE WAY IT DID AND THERE WAS NOTHING WRONG WITH APPLE TO PROVIDE THEIR IPHONE ONLY TO AT & T BUT THAT WHAT APPLE HAS DONE SECRETLY AND WHAT APPLE HAS DONE SUBSEQUENTLY HAVE BEEN UNLAWFUL EXERCISES OF ACTUAL OR THREATENED MONOPOLY POWER.

AND IF I CAN I'D LIKE TO EXPLAIN EXACTLY WHAT I MEAN BY THAT. APPLE'S ENTRY INTO THE IPHONE MARKET WAS NOT IN A VACUUM.

EVERYONE KNOWS THAT THE IPHONE -- I'M SORRY -- THAT THE CELLULAR TELEPHONE MARKET WAS WELL ESTABLISHED BEFORE APPLE BROUGHT IT'S PRODUCT TO MARKET SO APPLE HAD TO CALL IT A REVOLUTIONARY PRODUCT BECAUSE IT COMBINED THE FEATURES OF THE CELL PHONE WITH THE FEATURES OF AN IPOD AND THE FEATURES OF A WEB DEVICE THAT ALLOWED CONSUMERS TO BASICALLY CARRY A PERSONAL COMPUTER IN THEIR POCKETS.

AND APPLE, AND I THINK MY OPPONENT GLADLY ACKNOWLEDGES THAT APPLE'S PRODUCT IS PRIMARILY WHAT SELLS THE IPHONE TO PEOPLE BECAUSE IT IS A VERY UNIQUE COMBINATION OF PRODUCTS.

BUT THE FEATURE THAT APPLE WANTS THE COURT TO IGNORE IS THAT UNDER THE AT & T AGREEMENT AND UNDER WELL-ESTABLISHED EXISTING PRACTICE IN THE

CELLULAR PHONE INDUSTRY, CONSUMERS WHO BUY THE IPHONE OR ANY OTHER CELL PHONE FOR THAT MATTER HAVE A RIGHT TO TERMINATE THEIR SERVICE AGREEMENTS WITH THE EXCLUSIVE PROVIDER AND IN EVERY OTHER CASE, EXCEPT FOR THIS PRODUCT, IN EVERY OTHER CASE, EXCEPT FOR THE IPHONE, CONSUMERS HAVE A RIGHT TO USE THAT PRODUCT THAT THEY BUY.

THEY DON'T LEASE IT. THEY BUY IT. THEY HAVE A RIGHT TO USE THAT PRODUCT ON ANOTHER CELLULAR PROVIDERS NETWORK. THERE ARE FOUR, ESSENTIALLY FOUR CELLULAR PROVIDERS IN THE UNITED STATES. THERE'S AT & T AND T-MOBILE WHO OPERATE SOMETHING CALLED THE GSM SERVICE NETWORK. AND THEN THERE'S VERIZON AND CINGULAR WHO OPERATE SOMETHING CALLED THE CDMA CELLULAR NETWORK.

AND WHILE YOU CAN USE A CDMA PHONE ON A GSM NETWORK, YOU CAN USE A GSM PHONE ON ANY OTHER GSM NETWORKS, INCLUDING GSM NETWORKS IN VIRTUALLY EVERY OTHER COUNTRY IN THE WORLD.

THE IPHONE WORKS ON THE GSM NETWORK, AND I MENTIONED THE OTHER PROVIDERS IN THE WORLD BECAUSE IT'S ONE OF THE THINGS THAT APPLE AND AT & T DID NOT TELL CONSUMERS ABOUT, BUT IT IS ONE OF THE THINGS THAT HAS CAUSED SUBSTANTIAL INJURY TO THE PLAINTIFFS ALREADY AND THAT IS WHEN YOU TAKE

THIS PHONE IN YOUR SUITCASE, LIKE MOST OF US DO WHO TRAVEL, IF YOU LEAVE IT IN YOUR SUITCASE AND NEVER ANSWER A CALL, THAT PHONE CONSTANTLY COMMUNICATES WITH THE LOCAL CELLULAR NETWORK WHICH IN THE CASE SOME OF OUR CLIENTS WERE OVERSEAS CELLULAR NETWORKS.

AND YOU INCUR -- UNWITTINGLY AND UNKNOWINGLY YOU INCUR THOUSANDS OF DOLLARS IN ROAMING CHARGES SIMPLY BECAUSE YOU PACK YOUR PHONE IN YOUR BAG.

THIS IS BECAUSE APPLE AND AT & T HAVE AGREED THAT IN ORDER TO ENFORCE THE FIVE-YEAR COMMITMENT THAT APPLE MADE TO AT & T, IN ORDER TO ENFORCE IT, THEY CANNOT LET THE PLAINTIFFS OR ALL OF THE OTHER CONSUMERS WHO BOUGHT IPHONES EXERCISE THE TWO YEAR -- I'M SORRY -- EXERCISE THE TERMINATION RIGHTS THAT AT & T DESCRIBED IN THE SERVICE AGREEMENT AND APPARENTLY BIND THEM TO THREE ADDITIONAL YEARS THAT, THAT NO ONE, NO ONE EVER AGREED TO.

AND THE WAY THEY DO THAT IS THEY HAVE REFUSED TO PROVIDE THE UNLOCK CODES FOR SOMETHING CALLED THE SUBSCRIBER IDENTITY MODULE, THE SIMM CARD, WHICH IDENTIFIES THIS PHONE, NOT THIS KIND OF PHONE BUT THIS ACTUAL HANDSET. IDENTIFIES THIS

HANDSET TO THE CELLULAR WORLD SO THE CELLULAR WORLD SAYS, OH, GEES, IT'S MARK MAKING A PHONE CALL AND LET ME ROUTE IT THROUGH. AND IF THEY'RE CALLING MARK, LET ME FIND OUT WHERE MARK IS IN THE WORLD AND LET ME DIRECT THE PHONE CALL TO HIM. THAT'S WHAT THE SIMM CARD DOES.

THE COURT: BUT THAT'S NOT AN AFTER-MARKET FEATURE. THAT'S SOMETHING THAT IS A FEATURE OF THE PHONE ITSELF.

IN OTHER WORDS, WHAT YOU'RE, WHAT YOU'RE -- I'M JUST TRYING TO CLARIFY THE PROBLEMS. IN OTHER WORDS, WHEN YOU BUY THIS PHONE, IT DOES NOT COME EQUIPPED WITH A FEATURE WHICH ALLOWS YOU TO LOCK ITS SIMM CARD.

MR. RIFKIN: YOU'RE RIGHT, THIS ONE DOESN'T. THIS ONE DOESN'T. ALTHOUGH EVERY OTHER ONE YOU CAN BUY THE PHONE AND YOU CAN CALL AT & T, VERIZON, OR T-MOBILE AND SAY, LOOK, I'D LIKE TO TRAVEL TO MEXICO --

THE COURT: BUT DO ALL CELLULAR PHONES HAVE THAT CAPABILITY? I GUESS I'M GETTING BEYOND MOTIONS TO DISMISS IN THE COMPLAINTS BUT ARE -- ARE ALL PHONES CAPABLE OF HAVING THEIR SIMM CARDS UNLOCKED IN A WAY THAT WOULD ALLOW YOU TO USE ANOTHER NETWORK?

MR. RIFKIN: CERTAINLY ALL MODERN CELL PHONES. I WON'T SPEAK TO CELL PHONES THAT PEOPLE WERE CARRYING THAT WERE BOUGHT 15 YEARS AGO, BUT ALL CELL PHONES THAT ARE SOLD NOW HAVE THIS FEATURE.

AND, IN FACT, I HAVE HEARD MY OPPONENT MENTION MOTOROLA ROCKER AND MY GUESS IS, AND I OBVIOUSLY DON'T WANT TO STRAY OUTSIDE OF THE COMPLAINT BECAUSE OBVIOUSLY WE'RE ON A MOTION TO DISMISS, BUT T-MOBILE WILL PROVIDE UNLOCK CODES FOR THE MOTOROLA ROCKER LIKE IT WILL PROVIDE UNLOCK CODES FOR ALL OF THE OTHER PHONES ON ITS NETWORK.

AND WE ALLEGE AND WE BELIEVE IT'S THE CASE THAT AT & T PROVIDES UNLOCK CODES FOR EVERY PHONE IT SELLS, EXCEPT FOR THIS ONE.

THE COURT: WELL, WHAT'S WRONG WITH THAT? WHAT IS WRONG WITH -- SO THE CONSUMER IS NOT ABLE TO USE THE PHONE IN EUROPE?

MR. RIFKIN: WELL, THE CONSUMER CAN USE THE PHONE IN EUROPE BUT MUST PAY SUPER COMPETITIVE PRICES TO DO SO AND THAT'S WHY WE TALK ABOUT AFTER-MARKETS AND THIS IS WHERE WE HAVE A FUNDAMENTAL DISAGREEMENT BETWEEN --

THE COURT: SUPER COMPETITIVE PRICES TO WHOM?

MR. RIFKIN: TO AT & T.

THE COURT: IS THAT RIGHT? IN OTHER WORDS, YOU CAN USE -- YOUR ALLEGATION IS THAT YOU CAN UNLOCK IT, BUT THEY TECHNOLOGICALLY MADE THE LOCK SUCH THAT IT'S ONLY AVAILABLE THROUGH AT & T?

MR. RIFKIN: WELL, YOU CAN UNLOCK IT AND EITHER IT'S ONLY AVAILABLE THROUGH AT & T AND AT & T HAS AGREED WITH APPLE NOT TO GIVE IT OUT OR YOU CAN GO OUT AND YOU CAN OBTAIN THIS SOFTWARE THAT LET'S YOU UNLOCK YOUR SIMM CARD, IN WHICH CASE APPLE'S VERSION 1.1.1 SOFTWARE DESTROYS THE PHONE.

JUST TO ILLUSTRATE BECAUSE THIS IS REALLY CRITICAL AND THIS IS REALLY THE HEART OF THE ISSUE.

MY BLACKBERRY IS A WORLD EDITION CELL PHONE AND WHEN I BOUGHT IT I HAD TO BUY THIS LITTLE INTERNATIONAL CHIP THAT YOU ACTUALLY STICK IN THE BACK OF THE PHONE AND IT GOES IN THE PHONE AND IT LET'S ME USE IT INTERNATIONALLY.

SO WHEN I TRAVEL INTERNATIONALLY OCCASIONALLY WHEN I HAVE TIME TO DO IT, I CALL VERIZON WHO IS MY CARRIER AND I SAY I'M GOING TO BE TRAVELLING TO MEXICO, CAN YOU ARRANGE FOR ME TO HAVE LOCAL SERVICE IN MEXICO THROUGH A LOCAL SERVICE PROVIDER THERE? AND THEY SAY, YES, OF COURSE, AND THEY DO WHATEVER THEY DO. WHEN I

TRAVEL TO MEXICO, I PAY REGULAR RATES WHEN I USE THE PHONE LIKE LOCAL.

IN OTHER WORDS, TO THE CELL PHONE IT DOESN'T MATTER WHETHER THE CELL PHONE CALL ORIGINATES IN MEXICO OR SAN JOSE BECAUSE IT'S A CALL.

BUT IN THIS CASE IT'S AN IPHONE, BECAUSE APPLE AND AT & T HAVE AGREED NOT TO LET CONSUMERS DO THAT.

WHEN ONE OF OUR PLAINTIFFS TRAVELLED TO MEXICO AND LEFT HIS PHONE IN HIS POCKET, IN THE TWO WEEKS HE WAS THERE, HE INCURRED $2,000 OF ROAMING CHARGES BECAUSE HIS PHONE WAS CONSTANTLY COMMUNICATING WITH THE MEXICAN CELL PHONE NETWORK TO RETRIEVE E-MAIL. HE NEVER READ THE E-MAIL BUT IT WAS READING E-MAIL ALL OF THE TIME.

AND, UM, HE CAME BACK AND HAD A PHONE CALL THAT WAS $2,000. AND THAT'S BECAUSE APPLE AND AT & T AGREED THAT THE SIMM CODE WOULD NOT BE PROVIDED SO THAT WHEN THE PHONE WAS TAKEN TO ANOTHER COUNTRY, THE PHONE COULD BE REGISTERED ON SOME LOCAL SERVICE THERE WHERE, BY THE WAY, I SHOULD ADD APPLE DOES NOT GET A KICKBACK.

THE PLAINTIFFS HAVE ALLEGED THAT THE REASON FOR THIS COMFORTABLE ARRANGEMENT BETWEEN

APPLE AND AT & T IS A REVENUE SHARING AGREEMENT BETWEEN APPLE AND AT & T, WHERE AT & T AGREES TO KICKBACK TO APPLE A PERCENTAGE OF THE REVENUE AT & T EARNS ON THE SERVICE FOR THE IPHONE.

SO APPLE HAS AN INCENTIVE IN ALLOWING AT & T TO EARN AS MUCH REVENUE AS POSSIBLE ON THE IPHONE BECAUSE APPLE HAS A PIECE OF THAT.

THE COURT: NOW, IS THAT PART OF THE CLAIM THAT THAT REVENUE SHARING NEEDS TO BE DISCLOSED AND IS NOT?

MR. RIFKIN: WELL, I THINK IT'S, NUMBER ONE, IT'S NOT DISCLOSED.

BUT, NUMBER TWO, I THINK IT MIGHT HELP THE MOST KNOWLEDGEABLE CONSUMER TO UNDERSTAND WHAT THE NATURE OF THIS TRANSACTION USUALLY IS.

THE COURT: AND BY THE WAY, YOUR FRIEND GOING TO MEXICO, IS THAT A CHARGE THAT WOULD HAVE STILL HAVE BEEN INCURRED IF THE PHONE WERE ON AND OFF? IT'S IN THE SUITCASE, I PRESUME IT'S ON.

MR. RIFKIN: I BELIEVE THAT'S CORRECT. I BELIEVE IF THE PHONE IS OFF, IT DOESN'T COMMUNICATE WITH THE NETWORK SO I WOULD HAVE NO WAY OF EXPECTING THAT THE CHARGES WOULD BE INCURRED.

BUT I MUST SAY THAT WHEN APPLE TELLS YOU WHAT IT SAYS TO THE CONSUMERS, ONE OF THE THINGS IT

SAYS IS THAT YOU CAN SEND AND RECEIVE E-MAIL, UNLIMITED E-MAIL WITHOUT INCURRING ANY ADDITIONAL CHARGES.

THAT'S JUST BLATANTLY MISLEADING BECAUSE IT DOESN'T TELL YOU THAT YOU CAN ONLY DO THAT IN YOUR HOME AREA WHICH FOR MOST PEOPLE IS THE DOMESTIC UNITED STATES.

BUT ONCE YOU WALK ACROSS THE BORDER, WHETHER IT'S MEXICO, CANADA, FRANCE OR GERMANY -- WELL, NOT FRANCE OR GERMANY BECAUSE NOW THEY REQUIRE APPLE TO PRODUCE UNLOCK CODES FOR THE IPHONE, BUT OTHER COUNTRIES IN EUROPE, YEAH, IF YOU'VE GOT THE PHONE IN YOUR POCKET AND IT'S ON, YOU DON'T HAVE TO SEND A CALL OR RECEIVE A CALL, YOU DON'T HAVE TO SEND AN E-MAIL, YOUR PHONE IS JUST RACKING UP CHARGES FOR AT & T AND WHICH IT SHARES WITH APPLE.

THE COURT: WELL, WHAT BOTHERS ME ABOUT YOUR ARGUMENT IS THAT IT SOUNDS NOW THAT AS THOUGH YOU'RE ARGUING THAT THE FEATURE OF THE AT & T SERVICE PROVIDED COMBINED WITH THE IPHONE IS NOT, PERHAPS, AS GOOD AS YOU CAN GET WITH ANOTHER COMPANY AND WHY DO THAT.

AND IF IT'S DISCLOSED, THAT THE FEATURE IS AT & T, AND YOU CAN FIGURE OUT THAT THAT'S NOT

AS GOOD AS OTHERS. YOU COULD GO TO SOMEPLACE ELSE.

SO WHAT ABOUT IT, THOUGH? I WAS CONCERNED THAT YOUR ALLEGATION WAS THAT THERE WAS UNKNOWABLE FEATURES.

AND SO IS YOUR ARGUMENT THAT IT IS UNKNOWABLE TO A CONSUMER THAT IN THE UNLIKELY -- OR IN THE EVENT THAT THEY TRAVEL TO A FOREIGN COUNTRY, THEY WILL NOT BE ABLE TO USE THE PHONE IN THE SAME WAY AS THEY MIGHT BE ABLE TO USE ANOTHER PHONE?

MR. RIFKIN: WELL, THERE ARE CERTAIN PARTS OF THIS THAT ARE UNKNOWABLE, AND I'LL GO THROUGH SOME OF THEM NOW.

FOR EXAMPLE, WHEN YOU BUY THIS PHONE, YOU HAVE NO WAY OF KNOWING THAT APPLE WILL NOT PROVIDE THE UNLOCK CODES FOR THE SIMM CARD. WE HAVE NO WAY OF KNOWING THAT. EVERY PHONE IS SOLD ON A NETWORK AND EVERY PHONE HAS A TERMINATION AGREEMENT.

THE COURT: BUT IF YOU ARE CHOOSING AMONG FEATURES OF A PHONE, YOU CAN SAY AS YOU SAY, I WANT A PHONE WITH A CARD THAT IS ALREADY ENABLED SO WHEN I GO I CAN USE IT AND YOU -- A CONSUMER CAN ASK, I WANT, I WANT A PHONE THAT HAS THOSE FEATURES, AND IF YOU'RE TOLD THIS ONE DOESN'T, YOU DON'T BUY THAT PHONE.

SO IT IS, IT IS NOT -- IT'S NOT HIDDEN,

IS IT?

MR. RIFKIN: IT'S NOT HIDDEN IN THE SENSE THAT WE HAVE NOT ALLEGED THAT ANY OF THE PLAINTIFFS ASKED AND WERE TOLD SOMETHING THAT WAS UNTRUE.

IT IS HIDDEN IN THE CASE THAT WE HAVE SAID, WE HAVE ALLEGED THAT APPLE AFFIRMATIVELY SAYS THAT YOU WON'T INCUR ANY EXTRA CHARGES FOR SENDING AND RECEIVING E-MAILS, NO MATTER HOW MANY E-MAILS YOU SEND AND RECEIVE. THAT STATEMENT WAS SIMPLY UNTRUE.

IT WAS NEVER SAID TO CONSUMERS AT ANY POINT IN TIME, UNLESS THEY ASKED FOR IT, AND I FRANKLY DON'T KNOW WHAT HAPPENED WHEN THEY DID ASK FOR IT SO I DON'T WANT TO VENTURE A GUESS.

BUT IT WAS NEVER TOLD TO CONSUMERS THAT YOU WOULD NOT BE PROVIDED WITH SIMM UNLOCKS. IT WAS NEVER TOLD TO CONSUMERS THAT THEY REALLY HAVE NO WAY OF TERMINATING THEIR CONTRACT WITH AT & T EXCEPT TO SIMPLY SWALLOW THE COST OF THE PHONE.

ONE OF THE REASONS WHY ALL OF THESE CONTRACTS ARE NOW TERMINABLE IS BECAUSE THERE IS A VIABLE AFTER-MARKET FOR CELLULAR SERVICE, NOT JUST FOR THE IPHONE, BUT FOR MOST PHONES.

AND, AND WHEN, WHEN I BUY A PHONE, FOR EXAMPLE, ON THE VERIZON NETWORK, SOME OTHER

PROVIDER MAY COME ALONG AND OFFER ME AN INCENTIVE TO JOIN THAT NETWORK, IN WHICH CASE I EXERCISE MY TERMINATION RIGHT UNDER THE VERIZON CONTRACT. I TAKE MY PHONE TO THE OTHER STORE AND I SAY, "WILL YOU PLEASE ACTIVATE MY PHONE?" AND THEY DO.

BUT IN THE CASE OF THE IPHONE, ALTHOUGH YOU ARE GIVEN A TWO-YEAR CONTRACT WITH THE RIGHT TO TERMINATE IT BEFORE THE END OF THE TWO-YEAR CONTRACT, THAT TERMINATION RIGHT IS ILLUSORY BECAUSE APPLE WILL NOT ALLOW YOU TO TAKE YOUR IPHONE TO T-MOBILE, THE OTHER CDMA CARRIER -- I'M SORRY -- THE OTHER GSM CARRIER, AND IT WILL NOT LET YOU TAKE IT AND ACTIVATE ON THE CARRIER BECAUSE IT REFUSES TO GIVE THE SIMM CODES TO T-MOBILE. SO T-MOBILE HAS NO WAY OF IDENTIFYING YOUR PHONE ON THE NETWORK AND THAT'S BECAUSE IN THE AGREEMENT BETWEEN APPLE AND AT & T WE SAY AFFECTS THE MARKET FOR CELLULAR TELEPHONE OF VOICE AND DATA SERVICE.

THERE'S NO QUESTION THERE'S A ROBUST MARKET FOR PEOPLE TO SWITCH CARRIERS ALL OF THE TIME.

I DON'T KNOW ABOUT YOU, BUT MY EXPERIENCE AS A CONSUMER IS I'M INUNDATED FROM COMMERCIALS AND FLYERS FROM OTHER CELLULAR CARRIERS SOLICITING MY BUSINESS. AND I KNOW I HAVE A RIGHT TO TERMINATE

MY VERIZON SERVICE AND MAYBE I HAVE TO PAY AN EARLY TERMINATION FEE, BUT, OKAY, I CAN DO THAT. BUT I CAN'T DO IT HERE BECAUSE APPLE AND AT & T HAVE AGREED THAT THAT WON'T BE ALLOWED.

NOW, THERE'S AN ISSUE ABOUT THE DURATION OF THIS AGREEMENT AND THEY POINT TO THE STUFF ON THE BOX. AND YOU'LL HAVE TO FORGIVE ME, I NEED TO PUT MY GLASSES ON TO READ THIS.

BUT IT SAYS IT REQUIRES A SERVICE PLAN WITH AT & T AND WHICH IS AN INITIAL TWO-YEAR AGREEMENT. NO QUESTION IT SAYS THAT.

AND THEN IT SAYS WIRELESS SERVICE IS SOLELY PROVIDED BY AND IS THE RESPONSIBILITY OF AT & T.

IT SAYS SERVICE PLAN WITH AT & T REQUIRED FOR CELLULAR NETWORK CAPABILITIES ON EXPIRATION OF THE INITIAL TWO-YEAR AGREEMENT.

NOW, YOU DON'T GET THE BOX UNTIL AFTER YOU BUY THE PHONE, BUT LEAVING THAT APART FOR A MINUTE.

IF AT & T WERE TO COME INTO THIS COURT OR ANY OTHER COURT ANYWHERE AND TRY TO ENFORCE THE LABEL ON THE BOX OR TRY TO ENFORCE THE NEWSPAPER ARTICLE THAT APPEARED MONTHS BEFORE THESE PHONES WERE EVER SOLD TO CONSUMERS, AS A BINDING CONTRACT

AGAINST ANYBODY WHO BOUGHT ONE OF THESE THINGS AND TRY TO ENFORCE THAT FOR THE FULL FIVE-YEAR DURATION OF THE AGREEMENT BETWEEN APPLE AND AT & T, I DON'T BELIEVE THERE'S A COURT ANYWHERE WHO WOULD FIND THE LABEL ON THIS BOX, OR THAT NEWSPAPER ARTICLE, TO CONSTITUTE A BINDING CONTRACT BETWEEN THE CONSUMER AND AT & T FOR FIVE YEARS, ESPECIALLY WHEN THE CONTRACT ITSELF THAT THE CONSUMER HAS TO ACCEPT IS ONLY A TWO-YEAR CONTRACT, DOESN'T SAY FIVE YEARS ANYWHERE IN IT.

THE COURT: WELL, THERE ARE PHONES THAT YOU BUY WHICH HAVE LIMITED LIFE AND AFTER THAT THE PHONE IS NO GOOD. YOU HAVE TO DO SOMETHING ELSE WITH IT.

MR. RIFKIN: BUT IT'S NOT A $500 OR $600 CELL PHONE.

THE COURT: WELL, I'M NOT SURE THAT PRICE IS THE DETERMINATIVE FACTOR, BUT WHAT I HEAR YOU ARGUING AT THIS POINT IS THAT THIS IS AN INSTRUMENT WHICH HAS A LIMITED LIFE.

DOES IT HAVE TO AMOUNT TO CONTRACTUAL PROVISIONS FOR IT TO OVERCOME YOUR -- THE -- OVERCOME THE OBJECTION THAT YOU HAVEN'T ALLEGED, THE ANTITRUST ISSUE?

MR. RIFKIN: YES, I THINK IT DOES AND LET

ME TURN TO THAT NOW.

YOUR HONOR, THIS CONCEPT OF AFTER-MARKET AND ANTITRUST CLAIMS ARISES BECAUSE OF THE SUPREME COURT'S DECISION IN THE KODAK CASE, WHICH OBVIOUSLY YOU'RE AWARE OF. IT HAS BEEN THE SUBJECT OF EXTENSIVE BRIEFING.

THERE ARE THREE LEGAL PRINCIPLES FROM THE KODAK CASE WHICH WE THINK ARE RELEVANT HERE. FIRST THE SUPREME COURT HELD THAT AN ANTITRUST CLAIM CAN BE BASED ON THE UNLAWFUL MONOPOLIZATION OF AN AFTER-MARKET, EVEN WHERE THE PLAINTIFF DOES NOT ALLEGE THAT THE DEFENDANT HAS OR EXERCISES MONOPOLY POWER OVER THE PRIMARY MARKET.

THAT ANSWERS THE MISCHARACTERIZATION OF THE COMPLAINT WHICH APPLE HAS MADE WHICH SAYS THAT WE HAVE CHALLENGED THEIR ENTRY STRATEGY. RESPECTFULLY WE HAVE NOT AND WE NEVER HAVE AND NEVER WILL.

WE CAN READ KODAK AS WELL AS ANYBODY ELSE HAS READ KODAK AND WE BROUGHT AFTER-MARKET CLAIMS FOR A REASON. IF WE WERE BRINGING PRIMARY MARKET CLAIMS, WE WOULDN'T HAVE CALLED THEM AFTER-MARKET CLAIMS.

THE NEXT PRINCIPLE THAT ARISES FROM THE KODAK CASE IS THAT THE LAW PERMITS AN ANTITRUST

CLAIMANT TO DEFINE A RELEVANT MARKET IN TERMS OF A SINGLE PRODUCT OR BRAND OF PRODUCT.

THAT'S WHAT WE HAVE DONE HERE. WE HAVE DEFINED THIS MARKET, THIS AFTER-MARKET, THIS RELEVANT AFTER-MARKET AS THE MARKET FOR IPHONE VOICE AND DATA SERVICE OR IPHONE THIRD PARTY APPLICATIONS.

IN ADDITION, THE THIRD RELEVANT PRINCIPLE AND I THINK THE MOST DIRECTLY RELEVANT ONE IS THAT IN THE ABSENCE OF A CONTRACTUAL COMMITMENT ON THE PART OF THE PLAINTIFF, THE CONSUMER WITH KNOWLEDGE THAT THEY WERE AGREEING TO SUCH A COMMITMENT, THE AFTER-MARKET CLAIM IS A VIABLE CLAIM. THERE ARE A SERIES OF THREE CASES THAT WE HAVE TRIED TO UNDERSTAND IN CONTEXT IN THIS SETTING.

ONE OF THOSE CASES IS KODAK AND THE OTHER TWO ARE THE CASES THAT WE CALL THE QUEEN CITY PIZZA CASE, THAT'S THE DOMINOS PIZZA CASE. AND THE OTHER IS FORESIGHT VERSUS HUMANA, AND THAT'S THE HUMANA INSURANCE CASE.

AND WE HAVE THE BENEFIT OF THE NINTH CIRCUIT'S DECISION IN UCAL VERSUS ICON EXPLAINING EXACTLY HOW TO DISTINGUISH THOSE THREE CASES AND HOW THE SUPREME COURT COULD FIND A VIABLE -- HOW THEY COULD FIND A VIABLE AFTER-MARKET ANTITRUST

CLAIM IN THE KODAK CASE BUT HOW THERE WAS NOT AN ANTITRUST AFTER-MARKET IN THE QUEEN CITY AND HUMANA.

AND THE DISTINCTION THE NINTH CIRCUIT POINTS TO IS THAT IN THE OTHER TWO CASES PLAINTIFFS AGREE RIGHT UP-FRONT TO THE EXCLUSIVITY THAT WAS DEMANDED OF THEM BY DOMINOS PIZZA.

IN THAT CASE IT WAS FRANCHISEES HAD TO BUY ALL OF THEIR PIZZA MAKING SUPPLIES FROM DOMINOS AND IN THE CASE OF HUMANA IT WAS THAT YOU HAD TO USE A HUMANA APPROVED HOSPITAL IF YOU WERE GOING TO GET THE BENEFIT OF YOUR INSURANCE COVERAGE.

THERE MUST BE A CONTRACTUAL COMMITMENT ENTERED INTO BY A CONSUMER WHO KNOWS THAT THEY WERE AGREEING TO SUCH A COMMITMENT BEFORE WE ARE REMOVED FROM THE KODAK AFTER-MARKET CLAIM AND THAT'S WHY WE SAY THIS, THIS LABEL ON THE BOX, OR THAT, THAT NEWSPAPER ARTICLE, ARE NOT ANYWHERE NEAR A CONTRACTUAL COMMITMENT ON THE PART OF THE CONSUMERS TO USE AT & T AND AT & T ONLY TO GIVE UP THEIR RIGHT TO TERMINATE THE CONTRACTS NOT TO ACCEPT UNLOCKING THE SIMM CARDS TO USE THEM WHEN THEY'RE TRAVELLING OR TO USE THEM HERE IN THE UNITED STATES, NOT TO USE A SINGLE THIRD PARTY APPLICATION THAT DOES NOT PROVIDE A REVENUE STREAM TO APPLE.

ALL OF THOSE THINGS ARE NOT CONTRACTUAL COMMITMENTS ON THE PART OF THE PURCHASERS OF IPHONES THE WAY WE CAN THINK OF THE DOMINOS FRANCHISEE OF AGREEING, YES, IF I'M GOING TO BE A DOMINOS FRANCHISEE AND OPERATE UNDER THE DOMINOS LABEL. I'M GOING TO BUY MY SUPPLIES FROM DOMINOS.

YES, IF I'M GOING TO HAVE A HUMANA INSURANCE COMPANY, I UNDERSTAND AND AGREE THAT I ONLY WILL HAVE THE BENEFIT OF THAT INSURANCE COVERAGE IF I USE HOSPITALS THAT ARE DESIGNATED BY HUMANA.

THE COURT: SO YOU DON'T MAKE THAT ARGUMENT WITH RESPECT TO THE FIRST TWO YEARS?

MR. RIFKIN: NO, I DO. I DO. AND THAT'S BECAUSE OF THE EARLY TERMINATION RIGHT. AND IT'S IMPORTANT TO UNDERSTAND THAT, AND I'M GLAD YOU ASKED THAT QUESTION.

THERE'S NO QUESTION THAT AFTER THE TWO YEARS EXPIRES, NO CONSUMER EVER AGREED TO ANY THREE-YEAR EXTENSION. IT'S JUST NOT HERE.

AND BUT EVEN WITH RESPECT TO THAT FIRST TWO-YEAR DURATION, I WANT THE COURT TO UNDERSTAND THAT WE HAVE ALLEGED THAT THE CONTRACT BETWEEN AT & T AND THE CONSUMER GIVES THE CONSUMER THE RIGHT TO TERMINATE.

THAT RIGHT EXISTS BECAUSE THESE CELLULAR PHONES ARE USUALLY AND IN EVERY OTHER CASE EXCEPT THE IPHONE, THEY ARE USUALLY PORTABLE FROM ONE CELLULAR SERVICE TO ANOTHER.

AND THE ONLY REASON THAT THEY'RE NOT PORTABLE HERE, THE PLAINTIFFS ALLEGE, IS BECAUSE APPLE AND AT & T AGREED THAT THEY WOULD NOT PROVIDE THE UNLOCK CODES WITH THE SIMM CARDS TO THE CONSUMERS WHO THEY, THEREFORE, LOSE THE RIGHT TO EXERCISE THEIR EARLY TERMINATION.

THE COURT: WHERE IS THAT AGREEMENT? IS THAT --

MR. RIFKIN: WHICH AGREEMENT?

THE COURT: THE AGREEMENT TO NOT PROVIDE THE UNLOCK CODE.

MR. RIFKIN: THAT'S AN EXCLUSIVE AGREEMENT BETWEEN AT & T AND APPLE.

THE COURT: SO WHAT HAPPENS AT THE END OF THAT FIVE YEARS? IS THAT AGREEMENT STILL ENFORCE AND EFFECT?

MR. RIFKIN: WE HAVE NO IDEA. REMEMBER, WE'RE ONLY A LITTLE MORE THAN A YEAR OUT.

THE COURT: WELL, BUT IF THE FIVE-YEAR CONTRACT IS THE ONLY SOURCE OF THE RESTRICTION, AND AT THE END OF THE FIVE YEARS, WE DON'T KNOW, AND,

AND CONSUMERS ARE TOLD YOU ARE LOCKED IN TO AT & T FOR TWO YEARS AND IN THE RENEWAL YOU'RE LOCKED INTO AT & T, IT SOUNDS TO ME LIKE A GOOD ARGUMENT CAN BE MADE THAT THE ENTIRE FIVE YEARS IS COVERED. I DON'T -- I'M NOT -- I'M JUST TRYING TO LAY THE ARGUMENT OUT. I HAVEN'T THOUGHT ENOUGH ABOUT IT BUT WHY WOULDN'T THE NOTICE THAT YOU'RE LOCKED INTO THIS PROVIDER FOR TWO YEARS AND THEREAFTER BE ENOUGH TO SAY TO A CONSUMER, IF I WANT TO -- IF YOU DON'T WANT TO BE LOCKED IN, BUY A DIFFERENT PHONE?

MR. RIFKIN: WELL, AGAIN, FOR TWO REASONS. I THINK THE NUCAL VERSUS ICON CASE THE NINTH CIRCUIT HAS MADE CLEAR THAT UNLESS THE NOTICE TO A CONSUMER IS SUCH THAT THE COURT CAN INFER A CONTRACTUAL COMMITMENT, WE DON'T GET OUT OF THE KODAK AFTER-MARKET THEORY, THERE IS NO WAY THAT THIS IS THE EQUIVALENT OF A CONTRACTUAL EQUIVALENT, THAT'S NUMBER ONE.

NUMBER TWO, IF YOU WERE TO SAY THAT AT LEAST THEY HAVE BEEN TOLD THAT THEY WERE BOUND FOR TWO YEARS, THEY REALLY HAVEN'T BEEN TOLD THAT THEY WERE BOUND FOR TWO YEARS. THEY HAVE BEEN TOLD THAT THEY HAVE A TWO-YEAR CONTRACT, WHICH THEY CAN TERMINATE AT ANY TIME.

AND IT TURNS OUT THAT THAT IS REALLY

ILLUSORY BECAUSE IF THEY TERMINATE IT --

THE COURT: I UNDERSTAND YOUR ARGUMENT ON THAT.

MR. RIFKIN: YOUR HONOR, I'M HAPPY TO ADDRESS THE OTHER CLAIMS. I WILL JUST SAY ONE THING BRIEFLY ABOUT THE CONSUMER TRESPASS CLAIM. I THINK I GET THE SENSE OF THE COURT'S APPROACH TO THAT, AND I THINK WE PROBABLY DON'T NEED TO ADD MUCH TO IT, BUT WE DO BELIEVE THAT APPLE DID WHAT IT DID WHEN IT RELEASED VERSION 1.1.1 KNOWING THAT IT WAS GOING TO CREATE THIS HARM AND WE FULLY EXPECT TO BE ABLE TO --

THE COURT: WHAT I'D HAVE YOU ADDRESS IS TO WHETHER THERE IS ANY SIGNIFICANCE TO THE REVISION.

MR. RIFKIN: I'M SORRY, TO THE?

THE COURT: THE ARGUMENT WAS MADE THAT YOU REVISED YOUR COMPLAINT AND IN THE REVISION SOMETHING WAS TAKEN AWAY FROM THE INTENTION THAT IT WAS DONE DELIBERATELY.

MR. RIFKIN: YES, WE HAVE -- WE HAD A DISAGREEMENT WITH APPLE ABOUT ONE PARTICULAR ISSUE AND THAT WAS DID APPLE SIT DOWN AND WRITE THE CODE WITH THE EXPRESSED PURPOSE IN MIND OF DESTROYING PHONES?

WE DON'T KNOW THAT TO BE A FACT. AND WHEN WE ALLEGE THAT, ALTHOUGH WE BELIEVE THAT TO BE THE CASE BECAUSE OF EVERYTHING ELSE THAT HAPPENED AROUND IT, APPLE SAID THAT WE DON'T WANT THAT ALLEGATION TO BE PURSUED IN THE COMPLAINT.

AND WE SAID, FINE, WE DON'T THINK THAT WE NEED TO ALLEGE, OR ACTUALLY SOMEBODY SAT DOWN AT THE COMPUTER AND SAID, AH-HA-HA-HA, LET ME SEE HOW I CAN DESTROY THESE PHONES.

AND WE HAVE ALLEGED AND THERE'S NO DISPUTE WITH THAT, WE HAVE ALLEGED THAT WHEN APPLE RELEASED 1.1.1.1, IT KNEW THAT IT WOULD DESTROY PHONES THAT WOULD HAD BEEN MODIFIED.

NOW, COUNSEL SAID IT WAS A SINGLE PHONE THAT HAD SOME INCOMPATIBILITY ISSUE AND IT'S NOT.

AND WE HAVE ALLEGED PLAINLY IN THE COMPLAINT THAT ACCORDING TO APPLE, THIS IS NOT US, BUT ACCORDING TO APPLE A LARGE NUMBER OF MODIFIED PHONES OR UNLOCKED PHONES OR PHONES THAT HAD THIRD PARTY APPLICATIONS WERE GOING TO BE AFFECTED BY VERSION 1.1.1 AND WERE AFFECTED BY 1.1.1, THE CONTENTION, THE DISPUTE BETWEEN US, WHICH WE AGREED TO PUT OFF TO ANOTHER DAY IS WHETHER THE PROGRAMMER SAT DOWN WITH THE SPECIFIC INTENTION OF WRITING THE LINE OF CODE THAT DID THAT OR NOT.

WE DON'T THINK THAT'S NECESSARY.

THE COURT: BUT WHAT I HAD TAKEN FROM YOUR COMPLAINT, AND PERHAPS WRONGLY, BECAUSE I DIDN'T UNDERSTAND THIS REVISION, WAS THAT THAT WAS UNNECESSARY, THAT 1.1.1 COULD HAVE BEEN WRITTEN TO DO THE WORK THAT IT DID, WITHOUT NECESSARILY DESTROYING THE FUNCTIONALITY OF THE PHONE.

MR. RIFKIN: THAT IS CORRECT, YOU HAVE CORRECTLY --

THE COURT: THAT IS STILL YOUR CONTENTION.

MR. RIFKIN: THAT IS OUR CONTENTION.

THE COURT: SO ALTHOUGH YOU DON'T KNOW WHETHER IT WAS DONE DELIBERATELY, IT WAS DONE KNOWINGLY.

MR. RIFKIN: THAT IS CORRECT. WE DON'T KNOW WHETHER THE PROGRAMMER HAD A SPECIFIC INTENTION IN MIND. WE DON'T THINK IT MATTERS. THERE'S NO DISPUTE, AND WE HAVE ALLEGED, AND FRANKLY APPLE HAS ANNOUNCED THAT IT KNEW WHEN IT RELEASED VERSION 1.1.1 THAT IT WAS GOING TO DESTROY PHONES.

STEVE JOBS REFERRED TO IT AS A CAT AND MOUSE GAME. AND HE SAID WE PLAY A CAT AND MOUSE GAME. AND HE KNEW WHAT THEY WERE DOING.

WE ARE CONFIDENT THAT WE'RE GOING TO BE ABLE TO PROVE THAT TECHNOLOGICALLY THEY CAN DO THIS BECAUSE THEY'VE CHANGED THE WAY THEY'RE DOING IT NOW. BUT AT LEAST WHEN THEY RELEASED VERSION 1.1.1 THAT'S WHAT THEY SET OUT THE FIVE-YEAR AGREEMENT THAT BOUND CONSUMERS TO AT & T FOR FIVE YEARS.

IF YOU TRY TO EXERCISE THE RIGHTS OF THE REGISTER OF COPYRIGHTS IN THE LIBRARY OF CONGRESS THAT YOU HAVE, IF YOU TRY TO EXERCISE THE RIGHTS THAT EVERY OTHER CELL PHONE CARRIER GIVES TO EVERY OTHER CELL PHONE OWNER, WE'RE GOING TO DESTROY YOUR PHONES. AND WE THINK THAT'S A PRETTY HARSH ACTION.

THE COURT: VERY WELL. LET ME GO BACK TO MR. WALL AND YOU HAD TIME LEFT ON YOUR CLOCK AND SO I'LL HAVE YOU REPLY.

MR. WALL: THANK YOU, YOUR HONOR. I SUPPOSE IT WOULD PROBABLY BE OUT OF SCHOOL IF I JUST ASKED PROFESSOR SANDOVAL TO COMMENT AT THIS POINT.

THE COURT: I THINK YOUR EARS WILL BE BURNING IN CLASS THOUGH.

MR. WALL: I'VE HAD THE PLEASURE OF TEACHING THAT CLASS AT SANTA CLARA AND I'M A 1980 GRAD. SO GO BRONCOS.

LOOK, IT'S VERY CLEAR THAT THEY HATE OUR

BUSINESS MOTTO. THEY REALLY DON'T LIKE THE FACT THAT WE SIGNED AN EXCLUSIVE AGREEMENT WITH AT & T.

THEY OBVIOUSLY HAVE THIS STRONG POLITICAL PHILOSOPHY THAT PEOPLE SHOULD BE UNABLE TO LOCK THEIR PHONES AND MOVE WHEREVER THEY WANT NONE OF THAT IS AN ANTITRUST ARGUMENT AND IT'S CERTAINLY NOT A MONOPOLIZATION ARGUMENT.

I THINK WE HAVE TO GO BACK TO FIRST PRINCIPLES HERE. THEY ARE DEAD. THEY HAVE NO CASE AT ALL UNLESS THEY SAY THAT THE APPLE, AT & T AGREEMENT IN THIS EXCLUSIVE DISTRIBUTION STRATEGY IS AN ACT OF MONOPOLIZATION, THAT IT IS -- IT WAS AN ABUSE OF MONOPOLY POWER THAT WE MONOPOLIZED AT THAT POINT IN TIME.

MOTOROLA WITH ITS ROCKER IS OUT THERE DOING THE SAME THING AND WILL BEAR THE CONSEQUENCES.

APPLE PUT THIS OUT. WE DO SHOW SOME OF THE PUBLICITY THAT SURROUNDED THIS BECAUSE IT HAD BEEN IN A NUMBER OF OTHER COMPLAINTS.

PEOPLE IDENTIFY IT AS A NEGATIVE ABOUT IPHONE THAT IT WAS ONLY GOING TO BE AVAILABLE FROM, FROM ONE CARRIER. THEY ALSO IDENTIFIED AS A NEGATIVE THAT IT WOULD ONLY BE AVAILABLE ON THE GS NETWORK, WHICH SOME PEOPLE DON'T LIKE AS MUCH AS

THEY LIKE THE CDMA NETWORK.

WHATEVER. THIS IS NOT AN ANTITRUST ARGUMENT BECAUSE IF EVERYTHING WE SAID ABOUT THE IPHONE WAS FALSE, MISLEADING, BLATANT LIES, CALL IT WHAT YOU WILL, THAT DOESN'T LOGICALLY OR LEGALLY INFER THAT WE WERE A MONOPOLIST.

WE MAY HAVE BEEN A, WE THINK, WE ARE, A VERY ABOVE BOARD HONEST COMPANY WITHOUT MONOPOLY POWER BUT MAYBE THEY THINK OTHERWISE.

ON NECESSITY, EXTENT OF DISCLOSURE, THESE KINDS OF CONSUMER PROTECTION THEMES HAVE NO LOGICAL OR LEGAL RELEVANCE TO THE QUESTION OF WHETHER WE WERE A MONOPOLIST WHEN THIS STRATEGY WAS UNDERTAKEN.

AND THAT'S THE, THAT'S THE OVERARCHING FUNDAMENTAL DISCONNECT BETWEEN THEIR CASE.

NOW, IT TURNS SO MUCH UPON A READING OF KODAK AND ICON THAT I'D LIKE TO USE THE REST OF MY TIME TO JUST SORT OF TALK ABOUT THOSE TWO CASES AND, AND THEN I'LL SUBMIT IT.

THE THING ABOUT KODAK IS THAT IT'S JUST WRONG TO SAY THAT KODAK WAS FOUND TO HAVE MONOPOLY POWER BECAUSE OF THE INADEQUACY OF ITS DISCLOSURES OR BECAUSE CONSUMERS DIDN'T KNOW.

WHAT HAPPENED IS THAT THE SUPREME COURT

REJECTED A DEFENSE, FRANKLY, I PRESSED FORWARD PERSONALLY THAT A DEFENSE TO A CLAIM OF MONOPOLY POWER WHICH IS THAT THE 90 PERCENT SHARE THAT WE HAD OF THE SERVICE MARKET AND THE 90 PERCENT SHARE THAT WE HAD OF THE PARTS MARKET, AND THE EVIDENCE THAT THE PLAINTIFF SAID THAT, THAT WE HAD RAISED PRICES AND WE HAD EXCLUDED COMPETITION WAS ALL LEGALLY IRRELEVANT BECAUSE WE DID NOT HAVE MARKET POWER IN THE FOREMARKET, IN THE EQUIPMENT MARKET.

AND THE SUPREME COURT IN UNPACKING THAT ARGUMENT, FOCUSSED ON TWO THINGS.

IT SAID, WELL, IN AN AFTER-MARKET WHAT CAN GO WRONG IS THAT IT'S A TWO-STAGE GAME. AND AT ONE STAGE YOU BUY A COPIER AND A COPIER COSTS $50,000 AND IT'S LIKE THE OLD ADAGE WHEN YOU DRIVE THE CAR OFF THE LOT IT'S NOT WORTH WHAT YOU JUST PAID FOR IT. IT DEPRECIATES AND YOU HAVE STRANDED INVESTMENT IN THAT COPIER.

AND SO THE SUPREME COURT IS SAYING WITH THOSE SWITCHING COSTS, YOU'RE NOT GOING TO -- YOU'RE NOT GOING TO ABANDON A $50,000 COPIER BECAUSE KODAK CHARGES AN EXTRA $10 FOR A REPLACEMENT PART EVEN IF THAT'S AN UNFAIR PRICE, JUST NO SANE PERSON WOULD DO THAT.

SWITCHING COSTS COULD CREATE AN

AFTER-MARKET IN A SECOND PERIOD.

OUR ANSWER TO THAT WAS, BUT, WAIT, YOU CAN ANTICIPATE THAT. YOU CAN THINK THAT, THAT -- YOU CAN KNOW THROUGH EXPERIENCE AND OTHERWISE THAT YOU ARE VULNERABLE TO EXPLOITATION THREE YEARS DOWN THE LINE AND SO YOU CAN PROTECT YOURSELF.

SO THE SUPREME COURT SAID ONLY IF YOU'RE ADEQUATELY INFORMED.

THE NET OF THAT WAS WE'RE BACK TO THE 90 PERCENT MARKET SHARE AND THE EVIDENCE OF RAISED PRICES AND EXCLUDED COMPETITION. THE CLASSIC INDICATORS OF MONOPOLY POWER.

IT HAS NOTHING TO DO WITH A PRINCIPLE THAT SAYS THAT NONDISCLOSURE ALONE CAN INFER OR IMPLY MONOPOLY POWER. THAT'S A NON SEQUITUR.

JUST THINK ABOUT IT. I'M IN THE LEGAL SERVICES MARKET. AND I AM PITCHING FOR A PIECE OF BUSINESS, AND I GO TO APPLE AND I GIVE THEM MY EXPERIENCE AND I SAY SO HONESTLY AND FORTHRIGHTLY AND I SAY THAT I WILL COMMIT MY TIME TO THIS CASE AND I MEAN IT, AND I LIVE UP TO THAT OBLIGATION.

NOW, THE SAME FACTS EXCEPT THAT I'M REALLY BUSY AND I HAVE NO INTENTION OF WORKING ON THIS CASE, AND I'M GOING TO PUSH IT DOWN TO SOME YOUNG ASSOCIATE.

NOW, THAT'S NOT VERY GOOD. THAT IS MAYBE DECEITFUL BUT DOES THAT MAKE ME A MONOPOLIST? DOES THAT GIVE ME MARKET POWER IN ANY ANTITRUST SENSE? OF COURSE NOT.

THE COURT: WELL, YOU SEE, WHAT I'M LISTENING FOR IS WHETHER OR NOT -- THIS IS A PHONE.

MR. WALL: RIGHT.

THE COURT: IT IS OF NO USE EITHER AS A PHONE OR A DATA PROCESSOR UNLESS IT RECEIVES SOME SERVICE.

MR. WALL: AND WE DON'T EVEN ALLOW YOU TO TURN IT ON UNLESS YOU GET SERVICE.

THE COURT: IT WON'T POWER UP?

MR. WALL: IT WILL POWER UP BUT UNTIL YOU ACTIVATE IT, YOU CAN'T USE ANY OF THE OTHER FUNCTIONS.

THE COURT: IT CAN'T PERFORM ITS ESSENTIAL FUNCTION WITHOUT THE SERVICE.

MR. WALL: RIGHT. RIGHT.

THE COURT: AND WHAT THE PLAINTIFFS ARE CONCERNED ABOUT AS I READ THEIR COMPLAINT IS THAT ESSENTIALLY THEY ARE LOCKED IN FOR A PERIOD OF TIME AND, QUITE FRANKLY, THEY'RE LOCKED IN FOREVER. THERE'S NO OTHER PLACE TO GO FOR THE FEATURE OF THE PHONE THAT IS THE HEART OF IT, BUT TO A, A MARKET

THAT, THAT IS -- HAS ONLY ONE SERVICE PROVIDER.

MR. WALL: RIGHT.

THE COURT: AND SO THAT SERVICE PROVIDER, IN THE FUTURE, CAN CHARGE WHATEVER IT WISHES FOR THAT SERVICE.

MR. WALL: AND, AND IF IN THE FUTURE THE, THE -- YOU KNOW, AT & T OR APPLE DO SOMETHING TO, TO HARM COMPETITION AND IN THE FUTURE, I BET YOU SOMEBODY IS GOING TO TRY TO ARGUE THAT THAT IS AN ABUSE OF FUTURE AFTER-MARKET POWER BUT THAT HAS NOTHING TO DO WITH TODAY.

THE COURT: IT MIGHT IN THE SENSE THAT THE CONSUMER DOESN'T KNOW OF THAT FEATURE.

IS THERE ANYTHING THAT SAYS TO A CONSUMER, YOU ARE LOCKED IN FOREVER?

MR. WALL: YES. THE BOX (INDICATING).

THE COURT: WELL.

MR. WALL: I'M NOT SURE THERE IS MUCH ON THIS BOX.

THE COURT: WELL, I'M NOT SURE THERE'S ENOUGH FOR THAT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ONLY. MAYBE AFTER MOTIONS AND CONSIDERATIONS THE CASE CAN COME TO A DIFFERENT CONCLUSION AS TO WHETHER THERE IS AN ABILITY TO STATE A CLAIM HERE. I HAVE TO BE VERY LIBERAL

HERE.

MR. WALL: WELL, YOU HAVE TO BE LIBERAL BUT YOU HAVE TO BE TRUE TO THE PRINCIPLES OF WHAT THE LAW LAYS DOWN FOR HOW YOU PROVE MONOPOLY POWER.

AND REMEMBER, WHAT I'M TRYING TO EXPLAIN HERE IS THAT IN THE KODAK SETTING, WHAT THE SUPREME COURT -- THE SIGNIFICANCE OF INFORMATION AND THE QUALITY OF INFORMATION IS VERY NARROW.

IT IS EXCLUSIVELY TO ANSWER THE CLAIM THAT WHERE THERE IS OTHERWISE A REAL AFTER-MARKET AND WHERE THERE IS OTHERWISE SWITCHING COSTS, AND WHERE OTHER -- AND WHERE THE CONDUCT OCCURS LATER IN THE TIME AFTER THE INITIAL PURCHASE AND IT AFFECTS THE AFTER-MARKET, THAT THE FACT THAT THIS MIGHT HAVE BEEN ANTICIPATED ISN'T ENOUGH TO GET THE DEFENDANT OFF THE HOOK.

THAT'S NOT THE SAME THING AS SAYING, AS SAYING BECAUSE THERE'S, THERE'S A PROBLEM WITH THE QUALITY OF INFORMATION THAT IS AVAILABLE AT THE TIME OF PURCHASE, A BRAND NEW ENTRANT INTO A MARKET CAN BE -- CAN BE SADDLED WITH THE OBLIGATIONS OF A MONOPOLIST SUBJECTED TO TREBLED DAMAGES AND SO FORTH.

YOUR HONOR, I CAN SAY THIS BECAUSE I REPRESENTED KODAK, I HAVE LIVED THESE CASES

PROBABLY MORE THAN ANYONE ELSE IN THE COUNTRY, THERE HAS NEVER BEEN A CASE, EVER, WHERE THE AFTER-MARKET THEORY WAS APPLIED TO A STRATEGY THAT WAS AN INITIAL ENTRY STRATEGY LIKE THIS ONE AND THE PLAINTIFFS CAN SAY THAT THEY'RE NOT CHALLENGING OUR ENTRY STRATEGY, BUT THEY ARE CHALLENGING THE EXCLUSIVE DISTRIBUTION AGREEMENT BY WHICH WE ENTERED THIS MARKET.

THAT IS THE SAME THING.

THE COURT: WELL, I AM GOING TO CUT YOU OFF AT THIS POINT.

MR. WALL: YOU PROBABLY HAVE TO OR I'LL KEEP GOING. I UNDERSTAND THAT.

THE COURT: YOU KNOW, IT'S INTERESTING, I HAD THIS FEELING OF DEJA VU BECAUSE RON KATZ WAS INVOLVED IN THE KODAK CASE.

MR. WALL: YES, HE WAS.

THE COURT: AND I HAD HIM MAKING AN ARGUMENT IN ANOTHER ANTITRUST CASE AND HE WAS MAKING THAT SAME PASSIONATE PLEA, I WAS INVOLVED IN KODAK. SO I FEEL LIKE I WAS THERE.

MR. WALL: IT'S SORT OF LIKE IF YOU WERE A VIETNAM VETERAN AND YOU WERE THERE AND YOU WAKE UP IN THE MIDDLE OF THE NIGHT WITH SWEATS, IT'S THAT KIND OF THING.

THE COURT: THANK YOU, COUNSEL. AND I APOLOGIZE YOU HAVEN'T BEEN GIVEN MORE TIME BECAUSE I'M SURE THE ARGUMENT WOULD HAVE BENEFITED FROM IT, BUT I THINK I HAVE ENOUGH.

AND AS I SUGGESTED TO YOU, WHAT I WILL PROBABLY DO IS DO AS MUCH OF THIS AS I CAN NOW AND SAVE LATER PARTS FOR LATER AND SO YOU'LL GET ANOTHER SHOT AT IT IF I DO THAT.

OTHERWISE, SINCE THE NATURE OF THESE MOTIONS ARE EARLIER IN THE CASE, I'M SURE AS THESE ISSUES ARE SHARPENED BY FURTHER PROCEEDINGS, I'LL BENEFIT FROM FURTHER ARGUMENT ON THESE MATTERS AS WELL.

SO MATTERS ARE SUBMITTED.

MR. WALL: THANK YOU, YOUR HONOR.

(WHEREUPON, THE EVENING RECESS WAS TAKEN.)